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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NADINE HURWITZ,

Petitioner,

vs.

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services; Geri Martin, as Associate Personnel Administrator of the New York State Department of Social Services; The New York State Department of Social Services; The New York State Department of Civil Service; and Jaymala Ambewadikar, as Associate Physician with the New York State Department of Civil Service,

Respondents.

For a Judgment pursuant to CPLR Article 78 reviewing and annulling the actions of respondents in terminating petitioner's employment and for other appropriate relief.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a tenured public employee has received constitutionally sufficient pretermination process if she is fired based upon a state physician's finding that she is unable to perform the full duties of her position and told that her only pre-termination recourse is to persuade the State physician to rescind the aforesaid finding?

2. May a state civil service law permit the termination of a public employee on the grounds that she is "absent" from work if the only reason the employee is "absent" is that the public employer has barred her from returning to work?

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NADINE HURWITZ,

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CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nadine Hurwitz respectfully prays that a writ of certiorari issue to

review the orders and opinions of the New York State Court of Appeals, entered in the above-entitled proceeding on July 6, 1993 (upon reargument) and April 29, 1993.

OPINIONS BELOW

The July 6, 1993 order and opinion of the New York State Court of Appeals denying petitioner's motion for reargument has not, so far as petitioner is aware, been reported. This order is reproduced in the accompanying appendix at A1-A2.

The April 29, 1993 opinion of the New York State Court of Appeals reversing the decision of the Appellate Division is reported at 81 N.Y.2d 182 and at 597 N.Y.S.2d 288, and is also reproduced in the accompanying appendix at B1-B8.

The January 30, 1992 opinion of the New York State Appellate Division, First

Department, is reported at 179 A.D.2d 586 and at 579 N.Y.S.2d 67, and is also reproduced in the accompanying appendix at C1-C6.

The February 16, 1990 opinion of the New York State Supreme Court (Miller, J.) has not, so far as petitioner is aware, been reported. This opinion is reproduced in the accompanying appendix at D1-D7.

JURISDICTION

Petitioner contends that the termination of her public employment, purportedly pursuant to New York State Civil Service Law §73, without constitutionally sufficient pre-termination or post-termination process violated 42 U.S.C. §1983.

The jurisdiction of this Court to review the dismissal of petitioner's claims by the New York State Court of Appeals is invoked under 28 U.S.C. §1257(a).

STATUTES INVOLVED

(i) 42 U.S.C. §1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(ii) New York State Civil Service Law §73 reads, in pertinent part, as follows:

> §73. Separation for ordinary disability; reinstatement.
>
> When an employee has been continuously absent from and unable to perform the duties of his position for

> one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, his employment status may be terminated and his position may be filled by a permanent appointment.

STATEMENT OF THE CASE

Petitioner Nadine Hurwitz ("petitioner") commenced this proceeding to challenge the termination of her employment as a Principal Management Specialist with the New York State Department of Social Services ("DSS"). Petitioner was fired by the DSS on

April 28, 1988, purportedly pursuant to New York State Civil Service Law §73 ("Civil Service Law §73"), on the grounds that she had been "absent" from her job for more than one year and was "unable to perform the duties of [her] position." In fact, petitioner had asked to return to work in January 1988, and was "absent" from work thereafter only because she was not allowed by the DSS to return to work. The New York State Appellate Division, First Department, held that petitioner was fired without constitutionally adequate pre-termination process. The New York State Court of Appeals reversed and dismissed the proceeding.

Petitioner had been employed by the DSS since July 1966. In early January 1987, petitioner became ill and was diagnosed as

suffering from a labyrinthine dysfunction. Petitioner was out of work as a result of this illness from January 5, 1987 through February 4, 1987. She returned to work on February 5, 1987 but suffered a relapse on February 11, 1987 and again was out sick.

On or about January 7, 1988, petitioner's physician, Dr. Arnold Drapkin, determined that she was fit to return to work. In a letter dated January 7, 1988, Dr. Drapkin stated that petitioner could return to work by February 3, 1988. The DSS, however, did not permit petitioner to return to work. Instead, it insisted that she be medically evaluated by Dr. Jaymala Ambewadikar, an Associate Physician with the Employee Health Service Unit of the New York State Department of Civil Service. Dr.

Ambewadikar concluded that petitioner still had "unpredictable" symptoms which might prevent her from performing the "full unrestricted duties of her title." Dr. Ambewadikar claims to have reached this conclusion, despite petitioner's desire to return to work and despite petitioner's lack of any objective symptoms, because (i) petitioner declined during her examination by Dr. Ambewadikar to lie flat on an examining table (to avoid even the risk that this position, which she avoids even when sleeping, might precipitate a recurrence of her symptoms); (ii) petitioner also allegedly refused to bend over and try to touch her toes (petitioner denies this); and (iii) Dr. Drapkin's letter dated January 7, 1988 did not sufficiently resolve Dr. Ambewadikar's doubts.

Based upon Dr. Ambewadikar's statement that petitioner could not perform the "full unrestricted duties of her position," the DSS terminated petitioner's employment effective April 28, 1988 pursuant to Civil Service Law §73 on the grounds that she had been "absent" for more than one year and was unable to perform the duties of her position. Respondents did not provide petitioner with any pre-termination process beyond telling her that she could try to persuade Dr. Ambewadikar to change her mind.[1]

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[1] Respondents did decide to allow petitioner to be re-examined by Dr. Ambewadikar's Supervisor, Dr. Lacot, but never told petitioner of this chance. Petitioner was told that there was no way to appeal Dr. Ambewadikar's findings. When petitioner gave up trying to persuade Dr. Ambewadikar to change her mind, the DSS withdrew the referral to Dr. Lacot, again without telling petitioner. See *infra* at 26-27, 31-32, 34-35.

Simply put, respondents barred petitioner from returning to work, provided her no meaningful pre-termination process, and then fired her because she was "absent".

Petitioner commenced a proceeding in 1988 to contest her dismissal. In a decision and judgment entered February 23, 1990, the Supreme Court, New York County (Miller, J.) held that the action of respondents in firing petitioner without a hearing was unlawful. The court ordered respondents to hold a hearing "regarding petitioner's alleged disability."

On May 9 and 10, 1990, the DSS conducted a "hearing." Disregarding the mandate of Justice Miller, the DSS only considered whether Dr. Ambewadikar's evaluation was "properly conducted," and decided that it would "continue to

consider" petitioner terminated. Petitioner then commenced the instant proceeding to contest this determination by the DSS.

Petitioner's challenge to the decision of the DSS was transferred to the New York State Appellate Division, First Department. In a decision and order dated January 30, 1992, the Appellate Division held that: (i) the DSS had denied petitioner adequate pre-termination due process; and (ii) the DSS hearing held in May 1990 was a post-termination rather than a pre-termination hearing since it improperly considered petitioner's condition as of February 1988 rather than her present ability to work. The Court therefore remanded the proceeding to the DSS for a "determination of whether

petitioner is presently disabled and unable to perform the duties of the position for which she was improperly terminated. . ." The Appellate Division found it unnecessary to address any of the other causes of action asserted in the petition, including petitioner's claim that she could not be terminated for being "absent" during a time when the DSS had barred her from returning to work.

Respondents sought and were granted leave to appeal to the New York State Court of Appeals from the January 30, 1992 Appellate Division decision and order.

In an opinion and order both dated and entered on April 29, 1993, the Court of Appeals reversed the Appellate Division and dismissed the petition. In its Opinion, the Court of Appeals only

addressed the issue of whether the pretermination process afforded to petitioner comported with Due Process, and did not mention any of petitioner's other claims even though these claims (including both federal and state causes of action) were addressed in petitioner's brief to the Court of Appeals.

Petitioner duly and timely moved to reargue before the Court of Appeals. In this motion, petitioner noted that both the Court's April 29, 1993 ruling as well as the decision of the Appellate Division below only addressed one of petitioner's fifteen causes of action, and suggested that the Court should either address these other claims or else remand the proceeding to the Appellate Division to consider petitioner's other fourteen causes of

action. Respondents opposed this motion, contending that the Court of Appeals in its April 29, 1993 ruling had disposed of all of petitioner's other claims *sub silentio*.

In an order dated and entered on July 6, 1993, the Court of Appeals denied petitioner's motion to reargue without explanation.

REASONS FOR GRANTING THE WRIT

I

PETITIONER DID NOT RECEIVE CONSTITUTIONALLY SUFFICIENT PRETERMINATION PROCESS

Whether a public employee has a property interest in his or her position is determined by state law. *Bishop v. Wood*, 426 U.S. 341 (1976). A property interest implies more than an abstract desire for a position. An employee only has a property interest in a civil service position if he or she has a "legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564 (1972). This Court has held that if a public employee cannot be removed except for "cause," he or she has a constitutionally

protected property interest in his or her position. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-539 (1985). Since petitioner had long since completed her probationary period as a Principal Management Specialist as of 1988, she could only be removed for cause pursuant to New York State Civil Service Law §75. Accordingly, petitioner had a protected property interest in her job. Indeed respondents have never denied that petitioner had a property interest in her position as a Principal Management Specialist with the DSS.

Although property interests are defined by state law, the procedural protections which are available to an employee who enjoys a property interest are a matter of federal law. As this Court explained in

Loudermill, state law does not define what constitute adequate procedures to protect against the deprivation of property rights. 470 U.S. at 540-541. The question of what process is due is strictly a matter of federal constitutional law. *Id.* Pursuant to this rationale, this Court held in *Loudermill* that a tenured public employee may not be terminated consistent with the Due Process Clause without a pre-termination hearing:

> An essential principle of due process is that a deprivation of life, liberty, or property `be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane* v.

Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' [footnote omitted] *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); see *Bell v. Burson*, 402 U.S. 535, 542 (1971). This principle requires 'some kind of a hearing' prior to the

> discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents v. Roth*, 408 U.S. 593, 599 (1972).

Loudermill, supra, 470 U.S. at 542.

While the pretermination hearing provided for in *Loudermill* need not be a full evidentiary hearing, it must provide "meaningful notice and hearing proceedings before discharging an employee for cause." *Loudermill, supra*, 470 U.S. at 551-552 (Brennan, J., concurring). As this Court concluded:

> The essential requirements of due process, and all

that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement...The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Loudermill, supra, 470 U.S. at 546.

In *Prue v. Hunt*, 78 N.Y.2d 364 (1991), the Court of Appeals applied *Loudermill* to Civil Service Law §73. The Court had previously held in *Economico v. Village of Pelham*, 50 N.Y.2d 120 (1980), that a post-termination hearing constituted sufficient Due Process in the context of a termination under Civil Service Law §73. *Economico*, however, was decided prior to *Loudermill*. In *Prue*, the Court of Appeals held that *Economico* was no longer good law; and that discharges under Civil Service Law §73:

> ...must be accompanied by pre-termination notice and a minimal opportunity to be heard.

(*Prue v. Hunt, supra*, 78 N.Y.2d at 366). The Court noted in *Prue* that the pre-termination process to which a terminated employee is entitled under Civil Service Law §73 need not include a "full evidentiary hearing." The Court did, however, note that pre-termination Due Process requires "notice and some opportunity to respond." *Id.* at 369. This would, at a minimum, include:

> ...an explanation of the grounds for the discharge and an opportunity to respond prior to [her] discharge.

(*Id.* at 370)

In the instant matter, the Court of Appeals held that constitutionally

sufficient pretermination process in cases governed by Civil Service Law §73 need only include:

(i) A direction that an employee be examined by a State physician;

(ii) Notification to the employee that the State physician found him/her unfit; and

(iii) Allowing the employee a chance to persuade the State physician to change his/her mind.

Petitioner respectfully submits that this process does not provide the safeguards mandated in *Loudermill*.

The flaws in respondents' procedures were well articulated by the prior lower court decisions here. In directing a

hearing on the issue of petitioner's fitness to work, Justice Miller of the Supreme Court, New York County reviewed the "process" afforded petitioner:

> By letter dated February 4, 1988 petitioner was notified that she would be required to submit to an Employee Health Services examination to evaluate her ability to perform the full duties required of her position as Principal Social Service Management Specialist. This examination was conducted by Dr. Jaymala Ambewadikar, an Associate Physician of the Employee Health Service (E.H.S.). On March 18, 1988 Dr. Ambewadikar submitted a medical evaluation which indicated that the petitioner's

illness precluded her from returning to her position at work and performing her full unrestricted duties. The petitioner subsequently contacted Dr. Ambewadikar for reconsideration of the medical evaluation. The doctor advised the petitioner that she would not change the evaluation as to the petitioner's inability to perform her duties at work. Dr. Ambewadikar's supervisor, Dr. Antero Lacot, was contacted by petitioner and he informed the petitioner that he would be able to conduct a re-examination of the petitioner if DSS would make the referral to him. DSS officials decided to make said referral and to hold the termination proceedings in

abeyance until after the re-examination. At this point, respondents contend that the petitioner advised personnel that she decided not to contest the E.H.S. findings of Dr. Ambewadikar. Petitioner, on the other hand, maintains that she was advised that there was no process for appealing the medical evaluation and that her only recourse was to convince Dr. Ambewadikar to change her opinion. Since Dr. Ambewadikar had previously refused to change her evaluation it was an exercise in futility to have Dr. Ambewadikar conduct a re-examination.

The petitioner then withdrew her request for the medical re-

evaluation and subsequently applied for a New York State disability retirement and for disability benefits from the United States Social Security Administration. Both the state and the federal agencies disagreed with the E.H.S. report and the petitioner's applications for disability were denied...It is undisputed that the petitioner had sought to return to work prior to the continuous one year absence period from work, and that she was not permitted to return to work by the respondent. Moreover, the petitioner had disputed the fact that she was unable to return to work, and she had originally sought to challenge the respondent agency's

determination of her disability. In addition it appears that respondent failed to advise the petitioner of the decision to have a medical re-examination conducted by Dr. Lacot. It is this court's opinion that the petitioner at no time accepted the medical evaluation of Dr. Ambewadikar. The respondent failed to advise the petitioner of the fact that she could have an E.H.S. physician conduct a second medical examination. More importantly, the respondent did not inform the petitioner that in the event she disagreed with the E.H.S. medical determination she was entitled to a hearing wherein she would be able to present medical documentation in her favor to

> indicate that she was indeed able to perform all the duties required by her civil service position. In the absence of such notice to the petitioner it cannot be said that the petitioner had failed to contest the respondents' medical assessment and that she had knowingly waived her right to a hearing to review their determination.

See Appendix at D4-D9.

The analysis of respondents' process by the Appellate Division was similar:

> On or about January 7, 1988, petitioner submitted a letter to DSS from her physician stating that she should be able to return to employment by February 3. The letter also requested that

petitioner work part-time the first two months and that her location require minimal travel so that her condition would not be exacerbated. DSS responded by requiring petitioner to submit to an Employee Health Service (EHS) examination. Respondent Jaymala Ambewadikar, M.D., conducted the examination and on March 18, 1988, reported that petitioner was not able to return to her position and perform her full unrestricted duties. Dr. Ambewadikar rejected petitioner's request for a re-evaluation. DSS decided to have another EHS physician examine petitioner in light of Dr. Ambewadikar's refusal. However, before petitioner was advised of

this, she withdrew her request and apparently decided not to contest the EHS findings. Petitioner contends she did this because DSS advised here there was no appeal process; she had to get Dr. Ambewadikar to change her opinion.

By letter dated April 28, 1988, petitioner was terminated by DSS pursuant to Civil Service Law (CSL) Section 73, based upon the EHS findings which petitioner had 'decided not to contest.' Petitioner's termination was effective April 27, 1988.

See Appendix at C3-C5.

Even the analysis by the Court of Appeals of the DSS's pretermination process reveals the flaws identified by the two lower courts:

> Upon learning of DSS's doctor's report, petitioner contacted DSS to protest the evaluation and to request an appeal of Dr. Ambewadikar's opinion. Petitioner was informed that there was no appeal process in existence but that DSS would withhold further action until she could discuss the report with Dr. Ambewadikar. Both petitioner and her personal physician discussed the evaluation with Dr. Ambewadikar and tried to get her to change her opinion regarding petitioner's ability to

return to work. Dr. Ambewadikar declined to reconsider her opinion or to reexamine petitioner.

Petitioner had also discussed the evaluation with Dr. Ambewadikar's supervisor, Dr. Lacot, who told her that a second examination would be possible if DSS would make a referral for reexamination. At about this time, however, petitioner began to reexperience severe symptoms of labrynthitis.[2] Although DSS decided to make the referral for a second examination, petitioner

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[2] The Court's reference to the recurrence of symptoms was gratuitous, since there is nothing in the record to suggest that such recurrence played any role in plaintiff's decision to discontinue her futile debate with Dr. Ambewadikar or that the DSS knew or relied upon any alleged recurrence of symptoms in firing petitioner.

> withdrew her challenge to Dr. Ambewadikar's findings before being informed of DSS's decision. Thereafter, in April 1988, DSS terminated petitioner pursuant to Civil Service Law § 73.

See Appendix at B5-B6.

The DSS provided petitioner no means of contesting Dr. Ambewadikar's report. Petitioner was told by the DSS that there was no appeal of Dr. Ambewadikar's findings, and that petitioner's only recourse was to try to get Dr. Ambewadikar to change her mind. The DSS did not even tell petitioner that she could have Dr. Ambewadikar's findings reevaluated by Dr. Lacot (Dr. Ambewadikar's superior). Instead, the DSS fired petitioner the moment she gave up trying to persuade

Dr. Ambewadikar to change her opinion. Whatever appellation one may choose to assign to the "notice" petitioner received from the DSS, it was not Due Process.

Pursuant to this Court's holding in *Loudermill*, the pre-termination process to which petitioner was entitled did not have to include a full adversarial hearing. Petitioner was, however, entitled to notice from the DSS that: (i) she was at risk of being fired as a result of Dr. Ambewadikar's findings; (ii) that she had some way of contesting Dr. Ambewadikar's report (beyond trying to convince Dr. Ambewadikar to change her mind); and (iii) some intelligible explanation of why Dr. Ambewadikar was reluctant to let her return to work. (From what Dr. Ambewadikar had said and

written, it appeared that she was refusing to certify petitioner for return to work because Dr. Drapkin's letter was less clear than she would have liked and because petitioner had declined to lie down flat on an examining table.)

Petitioner was entitled to pre-termination notice and an opportunity to be heard. The DSS's actions denied petitioner both of these essential elements of Due Process. From what petitioner was told in early 1988, she had no "process" available to her other than to engage in a futile dialogue with Dr. Ambewadikar.

The hearing held by the DSS in May 1990 did not cure the problem. As the Appellate Division correctly noted, this was (at best) a post-termination hearing.

This hearing did not purport to be, and cannot properly be deemed to satisfy pre-termination requirements.

That the May 1990 hearing was a post-termination hearing was evident from the comments of the DSS's counsel and the Hearing Officer. Indeed, the Hearing Officer made this crystal clear during the hearing when he stated that:

> The Judge ordered us to hold a hearing to determine whether or not she was appropriately terminated as far as Section 73 was concerned.

The Final Determination and Order of the DSS eliminated any doubt on this issue, since it stated that:

> ...The Department shall continue to consider as terminated the

employment of Nadine Hurwitz from her position as Principal Social Service Management Specialist, Grade 27.

See Appendix at G5-G6.

The holding by the Court of Appeals here establishes a new standard for pre-termination process under Civil Service Law §73. Procedural Due Process requires that a person be heard at a meaningful time and in a meaningful manner before he or she is deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 219, 333 (1976). The standard applied by the Court of Appeals here makes a mockery of the "meaningful" process required by *Mathews v. Eldridge* and *Loudermill*. In a disciplinary case in which a supervisor recommends that a tenured employee is

guilty of misconduct, it is unthinkable that allowing the employee no recourse other than to try to persuade the supervisor to change his/her findings would be deemed adequate pre-termination process. At the very least, the employee would be allowed the chance to explain to the public employer why the supervisor was mistaken or why the proposed penalty was inappropriate. The conclusion should be no different here, even though the issue is medical fitness rather than misconduct.

II

PETITIONER COULD NOT CONSTITUTIONALLY BE TERMINATED FOR BEING "ABSENT" WHEN THE ONLY REASON FOR HER "ABSENCE" WAS RESPONDENTS' REFUSAL TO ALLOW HER TO RETURN TO WORK

Even assuming *arguendo* that petitioner received constitutionally sufficient pre-termination notice and an opportunity to be heard, the process she was afforded was deficient since that process itself was made the basis for her termination. As construed by respondents (and *sub silentio* by the Court of Appeals), Civil Service Law §73 allows a public employer to bar an employee from returning to work and then fire that employee for being "absent."

An employee may only be terminated under §73 if two conditions are met:

1) The employee has been "continuously absent" for one year or more; and

2) Throughout that period of absence and at the time of termination, the employee is unable to perform the duties of his or her position.

Petitioner was not continuously "absent" from her job for a period of a year prior to her request to return to work. Petitioner was continuously absent from February 11, 1987 until January 12, 1988, when Dr. Drapkin's letter of January 7, 1988 was received by the DSS. That letter stated that petitioner had "completely recovered" and that she should be able to return to work by February 3,

1988. Had respondents allowed petitioner to return to work on February 3, 1988, she would not have been out of work for a year, and could not have been terminated under Civil Service Law §73. Petitioner did not return to work on February 3, 1988 only because respondents did not permit her to do so. This case, therefore, presents the issue of whether an employee may be fired for being "absent" under Civil Service Law §73 when the employee is out of work only because a public employer refuses to allow the employee to return.

Petitioner had believed that this issue was foreclosed under New York State law. The holdings in *Bodnar v. New York State Thruway Authority*, 52 A.D.2d 345, 383 N.Y.S.2d 923 (3d Dep't. 1976) and *Economico v. Village of Pelham*, 67 A.D.2d

272, 415 N.Y.S.2d 239 (2d Dep't. 1979), aff'd 50 N.Y.2d 120 (1980) both suggest that Civil Service Law §73 does not allow termination of an employee for being "absent" during a period when his/her employer barred return to work. As the Court noted in *Bodnar*:

> ... section 73 does not apply to petitioner. His [sic] continuous one year absence from his job was not because of a continuing disability, but, rather, was forced upon him by the Authority's misuse of section 73 in imposing an involuntary leave of absence. The Authority refused to permit petitioner to return to work and was without warrant or authority to

require him to take an involuntary leave of absence without pay.

52 A.D.2d at 347-348, 383 N.Y.S.2d at 924. (Emphasis supplied.)

The July 6, 1993 decision of the Court of Appeals upon reargument, however, suggests (as respondents had contended) that Civil Service Law §73 does permit the termination of a public employee for being "absent" as a result of a public employer's refusal to allow the employee to return to work. See *supra* at 14-15. Although this finally resolves petitioner's state law claim under Civil Service Law §73, it renders §73 blatantly unconstitutional. (Petitioner's Eighth Cause of Action, see Appendix at E30-E31).

In stressing the need for pretermination process, this Court in *Loudermill* stated that:

> The right to due process `is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards.'

Loudermill, *supra*, 470 U.S. at 541; quoting from *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring). Whatever the precise boundaries of pretermination Due Process may be, it is beyond dispute that the process itself

cannot create the basis for termination. Yet that is precisely the construction of Civil Service Law §73 which the New York State Court of Appeals has now adopted.

According to the construction of §73 urged below by respondents (and apparently adopted *sub silentio* by the Court of Appeals), an employee who has been absent for less than one year and wants to return to work (at a time Civil Service Law §73 would not permit termination) may be barred from returning to work until he or she has been given a medical exam, and then fired for being "absent" once the one year has elapsed. Far from being a meaningful safeguard, this "process" is itself a means of rendering an employee eligible for termination. It is unthinkable that this Court in *Loudermill*

intended to countenance a process which, rather than allowing an employee notice and an opportunity to be heard, is a basis for stripping an employee of a protected property right.

The §73 "process" sanctioned by the Court of Appeals effectively nullified petitioner's property interest in her job. The DSS barred petitioner from returning to work, and then fired her for being "absent." The instant case presents an opportunity for this Court to invalidate this newly authorized use of §73 before it is applied to other New York State employees.

It must be stressed that nothing in this case affects the ability of a New York State public employer to seek removal of a tenured public employee who is

"incompetent" or for "misconduct" (including malingering) pursuant to Civil Service Law §75. The only issues presented here involve the firing of employees under Civil Service Law §73 for being "absent." If petitioner had been allowed to return to work on February 3, 1988 and had been unable to do her job or had further extended absences, the DSS could have initiated charges under Civil Service Law §75. Similarly, if respondents believed that petitioner was abusing Sick Leave, or was a malingerer,[3] they had adequate remedies under Civil Service Law §75. Thus, allowing petitioner to return to work on February 3, 1988 would not have saddled the DSS

[3] Respondents have never made such a charge, nor would such a charge have been justified.

with an incompetent or chronically sick employee. Petitioner was, however, entitled to a chance to prove she could still do the job. Respondents' unconstitutional use of Civil Service Law §73 deprived petitioner of that opportunity.

CONCLUSION

This petition raises important issues relating to the adequacy of the pre-termination process afforded New York public employees under Civil Service Law §73. Any decision here will affect the rights of hundreds of thousands of state and municipal civil servants, and could prevent the use of §73 as a means of stripping public employees of protected property interests. The rulings herein by the New York State Court of Appeals only nominally adhere to the standards articulated by this Court in *Loudermill*, and leave public employees open to gross

abuse. Accordingly, this petition for certiorari should be granted.

Dated: New York, New York
September 29, 1993

Respectfully submitted,

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Kenneth E. Gordon
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STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of July, 1993

PRESENT, Hon. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 609

In the Matter of Nadine Hurwitz,

Respondent,

v.

Cesar A. Perales, Individually and as Commissioner of the New York State Department of Social Services, et al.,

Appellants.

A motion for reargument to the Court of

Appeals in the above cause having been heretofore made upon the part of the respondent herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Smith took no part.

/s/ Donald M. Sheraw

Clerk of the Court

STATE OF NEW YORK

COURT OF APPEALS

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1 No. 85

In the Matter of Nadine Hurwitz,

Respondent,

v.

Cesar A. Perales, Individually and as Commissioner of the New York State Department of Social Services, et al.,

Appellants.

Robert J. Shack, for appellants.
Kenneth E. Gordon, for respondent.

HANCOCK, J.:

The issue in this case is whether the pretermination opportunity to be heard afforded petitioner comported with the

requirements of due process. In *Prue v. Hunt* (78 NY2d 364), we held that in the context of termination from civil service employment under Civil Service Law §73, due process requires notice and "some opportunity to respond" (id. at 369). We now address the companion question of what process is due at the pretermination stage. On transfer from the Supreme Court, the Appellate Division determined that petitioner was not provided pretermination procedures satisfying the requirements of due process. We disagree and, therefore, reverse.

I.

Petitioner Nadine Hurwitz had been a twenty year employee of respondent Department of Social Services (DSS) when she developed labrynthitis and went on continuous sick-leave beginning February 11, 1987. In December 1987, DSS informed petitioner that her sick leave would be extended until February 10, 1988 and that if she wished to return to her position she must provide medical documentation of her ability to perform her duties. DSS also informed her of potential termination upon her continuous absence for one year. In early January 1988, petitioner submitted to DSS a letter from her physician stating that she would be able to return to her position in early February 1988. The letter also requested that petitioner be permitted to work part

time and with reduced responsibilities during the first two months.

On receipt of the letter, DSS required petitioner to submit to an Employee Health Service (EHS) examination conducted by respondent Dr. Ambewadikar. During the examination, Dr. Ambewadikar observed symptoms of labrynthitis which, she concluded, would interfere with the performance of petitioner's job duties. After conducting the examination, reviewing medical reports of six physicians submitted by petitioner, and discussing the matter with petitioner's personal physician, Dr. Ambewadikar reported to DSS that petitioner was not able to perform the duties of her previous position.

Upon learning of DSS's doctor's report, petitioner contacted DSS to protest the evaluation and to request an appeal of Dr. Ambewadikar's opinion. Petitioner was informed that there was no appeal process in existence but that DSS would withhold further action until she could discuss the report with Dr. Ambewadikar. Both petitioner and her personal physician discussed the evaluation with Dr. Ambewadikar and tried to get her to change her opinion regarding petitioner's ability to return to work. Dr. Ambewadikar declined to reconsider her opinion or to reexamine petitioner.

Petitioner had also discussed the evaluation with Dr. Ambewadikar's supervisor, Dr. Lacot, who told her that a second examination would be possible if

DSS would make a referral for reexamination. At about this time, however, petitioner began to reexperience severe symptoms of labrynthitis. Although DSS decided to make the referral for a second examination, petitioner withdrew her challenge to Dr. Ambewadikar's findings before being informed of DSS's decision. Thereafter, in April 1988, DSS terminated petitioner pursuant to Civil Service Law § 73.

Petitioner commenced an Article 78 proceeding seeking reinstatement and back pay claiming that she had been discharged without being accorded her due process rights. Supreme Court granted the petition, holding that because petitioner was not informed of her right to a second evaluation before termination, she was

deprived of a meaningful pretermination opportunity to be heard. On remand, however, DSS conducted a hearing addressing only whether she was continually absent and unable to perform the duties of her position for a one year period.

After DSS adhered to its decision to terminate her, petitioner commenced the present Article 78 proceeding challenging the sufficiency of the DSS hearing claiming that it was in substance a post-termination hearing and that she had not yet received meaningful pretermination opportunity to be heard. On transfer from the Supreme Court, the Appellate Division remanded the matter for "a hearing on her present ability to perform the duties of her position with DSS" (*Hurwitz v.*

Perales, 179 AD2d 586, 588). This Court granted leave.

II.

In *Prue v. Hunt* (78 NY2d 364), this Court held that the requirements of due process announced in *Cleveland Bd. of Educ v. Loudermill* (470 US 532) mandate that public employees discharged under Civil Service Law § 73 be given pretermination notice and some minimal opportunity to be heard (*see, id.*, at 369-370). Significantly, we noted in *Prue* that due process does not require a formal hearing prior to discharge under § 73 (*see, Prue, supra*, at 370; Loudermill, supra, at 545-546). Noting that employees discharged under section 73 are entitled to a full <u>postermination</u> hearing, we held that at the <u>pretermination</u> stage, they

need only be "given an explanation of the grounds for the discharge and an opportunity to respond" (*Prue, supra*, at 369-370) [emphasis added]; *see, Loudermill, supra*, at 546). We observed that it is not necessary that the opportunity to be heard be formal or procedurally elaborate. Rather, the procedure must only be sufficient to serve "as an initial check against mistaken decisions" and it "need not definitively resolve the propriety of the termination" (*Loudermill, supra*, at 545-546). In the context of section 73 discharges, this amounts to no more than an opportunity for the employee to present opposing views as to whether she had been absent for one year or more and whether she was able to return to her position (*see, Prue, supra*, at 370).

In this case, petitioner was given adequate opportunity to respond to the claimed basis of her discharge prior to her termination. Petitioner was notified that she would be terminated upon her continuous absence for one year "by reason of a disability" and that she had the right to submit medical documentation demonstrating her ability to return to work in order to avoid discharge. Petitioner availed herself of this opportunity by having her physician report to respondent that petitioner was able to return to work. She then underwent the independent EHS evaluation by Dr. Ambewadikar and submitted numerous physicians' reports to Dr. Ambewadikar for consideration. Indeed, petitioner's own physician was consulted in compiling the report to DSS. Although she disagreed

with Dr. Ambewadikar's conclusions in the evaluation report, petitioner had several opportunities to dispute the correctness of the evaluation with Dr. Ambewadikar, with her supervisor and with the DSS, and to persuade each that the EHS was erroneous.

Under these circumstances, we conclude that petitioner has been given a sufficient "explanation of the grounds for the discharge and an opportunity to respond prior to [her] discharge" (*Prue, supra*, at 370). The fact that petitioner was not informed of DSS's decision to make a referral for a second evaluation does not diminish the adequacy of her opportunity to be heard for due process. Although the reexamination may have finally determined the correctness of

Dr. Ambewadikar's medical opinion, the ultimate validity of the evaluation is matter properly addressed in the posttermination hearing. Due process does not require that such questions be finally resolved at the pretermination stage (*see, Prue, supra,* at 369-370; *Loudermill, supra,* at 545-546).

Accordingly, the order of the Appellate Division should be reversed, with costs, respondent Commissioner's determination reinstated and petition dismissed.

* *

Order reversed, with costs, respondent Commissioner's determination reinstated and petition dismissed. Opinion by Judge Hancock. Chief Judge Kaye and Judges Simons, Titone and Bellacosa concur. Judge Smith took no part.

Decided April 29, 1993

Carro, J.P., Rosenberger, Ellerin, Smith, Rubin, JJ.

44280 In the Matter of the Application of Nadine Hurwitz,

Petitioner,

- against -

Cesar A. Perales, Individually and as Commissioner of the New York State Department of Social Services; et al.,

Respondents.

For a Judgment pursuant to CPLR Article 78 etc.

Determination of the respondent Commissioner of the New York State Department of Social Services dated August 3, 1990, which upheld petitioner's

termination from employment pursuant to Section 73 of the Civil Service Law, based upon her continuous absence from employment for more than one year by reason of disability, is unanimously annulled, the petition granted and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of the Supreme Court, New York County, Phyllis Gangel-Jacobs, J., entered January 10, 1991) is remanded to the New York State Department of Social Services for a determination of whether petitioner is presently disabled and unable to perform the duties of the position from which she was improperly terminated, without costs.

In 1987, petitioner, a Principal Management Specialist with the Department

of Social Services (D.S.S.) whose career there exceeded twenty years, was stricken with an illness. As a result, petitioner was on sick leave from January 5, 1987, until February 5, 1987. She worked from February 5, through February 10, 1987, and then resumed sick leave on February 11, 1987.

On or about January 7, 1988, petitioner submitted a letter to DSS from her physician stating that she should be able to return to employment by February 3. The letter also requested that petitioner work part-time the first two months and that her location require minimal travel so that her condition would not be exacerbated. DSS responded by requiring petitioner to submit to an Employee Health Service (EHS) examination. Respondent

Jaymala Ambewadikar, M.D., conducted the examination and on March 18, 1988, reported that petitioner was not able to return to her position and perform her full unrestricted duties. Dr. Ambewadikar rejected petitioner's request for a re-evaluation. DSS decided to have another EHS physician examine petitioner in light of Dr. Ambewadikar's refusal. However, before petitioner was advised of this, she withdrew her request and apparently decided not to contest the EHS findings. Petitioner contends she did this because DSS advised her there was no appeal process; she had to get Dr. Ambewadikar to change her opinion.

By letter dated April 28, 1988, petitioner was terminated by DSS pursuant to Civil Service Law (CSL) Section 73,

based upon the EHS findings which petitioner had "decided not to contest." Petitioner's termination was effective April 27, 1988.

Petitioner then unsuccessfully applied for New York State disability retirement and U.S. Social Security Administration disability benefits. Both the State and Federal agencies disagreed with the EHS report.

Petitioner then commenced an Article 78 proceeding in Supreme Court, New York County to contest, *inter alia*, her termination. By order entered February 23, 1990, and adhered to by order entered July 10, 1990 (Edith Miller, J.), the matter was remanded to DSS for a hearing "regarding petitioner's alleged disability." The IAS court found that

petitioner had never accepted the EHS medical evaluation, that she was never advised by respondent that a second EHS evaluation could be conducted and that she had a right to a hearing to contest the EHS findings, and that she had not knowingly waived her right to such a hearing. Therefore, in light of conflicting medical evidence, it was held that the termination was arbitrary, capricious, and unlawful in the absence of a hearing.

On remand, DSS conducted a hearing which addressed only whether petitioner was "continuously absent" and "unable to perform the duties of [her] position from February 11, 1987 through February 24, 1988. The issue of whether petitioner was presently disabled was never considered.

The physician who submitted petitioner's January 7, 1988 report of ability to return to employment testified that his cautionary suggestions were to prevent relapse. Petitioner testified that she had felt able to return to work full-time in January 1988, but she thought the part-time recommendation was prudent. Petitioner further testified that she had taken a full-time position with the Department of Transportation at a much lower salary. The medical testimony, based substantially upon post-January 1988 examinations of petitioner, was conflicting. By order dated August 3, 1990, DSS ruled, *inter alia*, that the disability period was from February 11, 1987 to February 24, 1988, and that petitioner was continuously absent and

unable to perform her duties by reason of a disability during that period.

It is not disputed that petitioner was not afforded a pretermination hearing prior to her April 1988 termination. In *Matter of Prue v. Hunt*, 157 A.D.2d 160 (1990), where a police officer was terminated without a hearing because he was continuously absent and unable to perform his duties due to a non-work related injury, the Appellate Division, Fourth Department held that federal due process mandates a pretermination hearing before an employee can be terminated under CSL §73. In affirming that decision, the Court of Appeals held that "the section 73 discharge in this case must be accompanied by pretermination notice and a minimal opportunity to be heard." *Matter of Prue*

v. Hunt, 78 N.Y.2d 364, 366 (1991). This defect was not cured by the hearing on remand because only petitioner's condition as of February 1988 was considered and not her present ability to work. As such, this was a posttermination hearing which clearly on these facts would not satisfy due process.

Accordingly, petitioner is entitled to a hearing on her present ability to perform the duties of her position with DSS. In light of the foregoing, we need not reach the remaining contentions of petitioner.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: January 30, 1992

Francis X. Galdi

Clerk

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : I.A.S. PART 33

----------X

In the Matter of the Application of

NADINE HURWITZ,

Petitioner,

Index
No. 17881/88

-against-

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services; et al.,

Respondents.

For a Judgment pursuant to CPLR Article 78 etc.

----------X

EDITH MILLER, J:

This is an application by petitioner for a judgment vacating and annulling the determination which terminated

petitioner's employment status from the respondent Department of Social Services (DSS) pursuant to section 73 of the Civil Service Law. Petitioner contends that respondent's decision to terminate her employment status in the absence of a hearing was arbitrary, capricious and unlawful.

The petitioner, whose career at DSS exceeded twenty years, was stricken with a labyrinthine disfunction in 1987. As a result of this condition, she was continuously absent from work from January 5, 1987 to February 3, 1988 with the exception of a four day period commencing February 9, 1987. During 1987, several physicans [sic] who had examined the petitioner submitted various letters indicating that the petitioner's

persistent condition of disequilibrium and dizziness prevented her from returning to work. In one letter dated November 19, 1987 Dr. Arnold Drapkin stated that the petitioner was "totally disabled and will remain so for another six months".

On December 10, 1987 the DSS Director of Personnel advised the petitioner by letter that petitioner's sick leave would be extended only until February 10, 1988. This letter, additionally advised the petitioner that if she wished to return to work she must first provide medical documentation attesting to her ability to perform the duties of her position. Said letter also referred to provisions of section 73 of the Civil Service Law providing for the termination of an employee's employment status when that

employee was continuously absent from work and unable to perform the duties of his position for one year or more by reason of a disability. One month later Dr. Drapkin wrote another letter addressed to "To Whom it may concern" that his patient should be able to return to work by February 3, 1987" [sic]. This letter contained a request that the petitioner be permitted to return to work on a half time basis for the first two months. Dr. Drapkin's letter also requested that his patient be permitted to "work at a location with minimal travel" between her home and place of work because extensive traveling could cause an exacerbation of the labrynthitis.

By letter dated February 4, 1988 petitioner was notified that she would be required to submit to an Employee Health

Services examination to evaluate her ability to perform the full duties required of her position as Principal Social Service Management Specialist. This examination was conducted by Dr. Jaymala Ambewadikar, an Associate Physician of the Employee Health Service (E.H.S.). On March 18, 1988 Dr. Ambewadikar submitted a medical evaluation which indicated that the petitioner's illness precluded her from returning to her position at work and performing her full unrestricted duties. The petitioner subsequently contacted Dr. Ambewadikar for reconsideration of the medical evaluation. The doctor advised the petitioner that she would not change the evaluation as to the petitioner's inability to perform her duties at work. Dr. Ambewadikar's supervisor, Dr. Antero

Lacot, was contacted by petitioner and he informed the petitioner that he would be able to conduct a re-examination of the petitioner if DSS would make the referral to him. DSS officials decided to make said referral and to hold the termination proceedings in abeyance until after the re-examination. At this point, respondents contend that the petitioner advised personnel that she decided not to contest the E.H.S. findings of Dr. Ambewadikar. Petitioner, on the other hand, maintains that she was advised that there was no process for appealing the medical evaluation and that her only recourse was to convince Dr. Ambewadikar to change her opinion. Since Dr. Ambewadikar had previously refused to change her evaluation it was an exercise

in futility to have Dr. Ambewadikar conduct a re-examination.

The petitioner then withdrew her request for the medical re-evaluation and subsequently applied for a New York State disability retirement and for disability benefits from the United States Social Security Administration. Both the state and the federal agencies disagreed with the E.H.S. report and the petitioner's applications for disability were denied. This Article 78 proceeding followed.

The Court of Appeals, ten years ago held that only when there is "some factual dispute impacting upon the employer's right to discharge" is a hearing required by that section 73 of the Civil Service Law (*In the Matter of Economico v. Village of Pelham*, 50 NY2d. 120, 128). It is

undisputed that the petitioner had sought to return to work prior to the continuous one year absence period from work and, that she was not permitted to return to work by the respondent. Moreover, the petitioner had disputed the fact that she was unable to return to work, and she had originally sought to challenge the respondent agency's determination of her disability. In addition it appears that respondent failed to advise the petitioner of the decision to have a medical re-examination conducted by Dr. Lacot. It is this court's opinion that the petitioner at no time accepted the medical evaluation of Dr. Ambewadikar. The respondent failed to advise the petitioner of the fact that she could have an E.H.S. physician conduct a second medical examination. More importantly, the respondent did not inform

the petitioner that in the event she disagreed with the E.H.S. medical determination she was entitled to a hearing wherein she would be able to present medical documentation in her favor to indicate that she was indeed able to perform all the duties required by her civil service position. In the absence of such notice to the petitioner it cannot be said that the petitioner had failed to contest the respondents' medical assessment and that she had knowingly waived her right to a hearing to review their determination. I find that the termination of the petitioner from her civil service position in the absence of a hearing was arbitrary, capricious and unlawful. The petitioner had a right to a hearing because the medical facts were in dispute.

Accordingly, the application is granted to the extent that these proceedings are remanded to the respondent agency for a hearing regarding the petitioner's alleged disability. The foregoing constitutes the decision and judgment of the court.

Dated: February 16, 1990

/s/

J.S.C.

VERIFIED PETITION

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

----------X

In the Matter of the Application of

NADINE HURWITZ,

Petitioner,

-against-

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services; et al.,

Respondents,

For a Judgment pursuant to CPLR Article 78 etc.

----------X

TO THE SUPREME COURT OF
THE STATE OF NEW YORK:

The petition of NADINE HURWITZ respectfully shows the following:

1. Petitioner is a citizen and resident of the City of New York, County of New York.

2. Respondent CESAR A. PERALES and/or his predecessors and successors is the Commissioner of the New York State Department of Social Services ("D.S.S.") and as such has all the powers and duties set forth in Social Services Law §17.

3. Respondent GERI MARTIN is and was at all relevant times herein an Associate Personnel Administrator in the D.S.S.

4. D.S.S. is an agency of the State of New York having all the powers and duties set forth in Social Services Law §5 *et seq.*

5. Respondent NEW YORK STATE DEPARTMENT OF CIVIL SERVICE is an agency

of the State of New York having all the powers and duties set forth in Civil Service Law §5 *et seq.*

6. Respondent JAYMALA AMBEWADIKAR is and was at all relevant times herein an Associate Physician in the Employee Health Service of the New York State Department of Civil Service.

7. From July 1966 until the date of her purported termination, petitioner was employed by the D.S.S.

8. On or about June 4, 1981, petitioner was promoted to the Civil Service title of Principal Management Specialist in the D.S.S. On or about October 21, 1982, petitioner attained permanent status in this position.

9. On or about January 1, 1987 petitioner became ill with what was later diagnosed to be a labyrinth dysfunction.

10. As a result of her illness, petitioner was on sick leave from approximately January 5, 1987 until February 5, 1987.

11. Petitioner returned to work in her position with the D.S.S. on or about February 5, 1987.

12. Petitioner performed her duties as a Principal Management Specialist with the D.S.S. from February 5, 1987 through February 10, 1988.

13. As a result of her illness as aforesaid, petitioner was on sick leave beginning on or about February 11, 1987.

14. On or about January 1988, petitioner submitted a letter to the D.S.S. from her physician, Dr. Arnold Drapkin, stating that she had "completely recovered", and indicating that she could return "to her usual job" by February 3. A copy of this letter is annexed hereto as Exhibit "A".

15. Dr. Drapkin's aforesaid letter of January 7, 1988 included the following requests:

> "Because of the extraordinarily long period of not working and relative physical inactivity (one year) and the nature of the problem (labrynthitis), I have two requests on her behalf:

1) She should be permitted to recondition herself to working by starting at half time for at least two months.

2) She should be permitted to work at a location with minimal travel required between her home and place of work. Extensive traveling could cause an exacerbation of the labrynthitis."

16. As of January 7, 1988, petitioner was fit to return to work, and was ready, willing and able to resume her duties as a Principal Management Specialist with the D.S.S.

17. Since January 7, 1988, and despite petitioner's expressed desire to return to work, respondents have refused to allow

her to return or to resume her duties as a Principal Management Specialist.

18. Since January 7, 1988, respondents have attempted to terminate petitioner's employment, purportedly pursuant to Civil Service Law §73.

19. In a letter dated February 4, 1988, a copy of which is annexed hereto as Exhibit "B", Associate Personnel Administrator Geri Martin notified petitioner that she was required to submit to a medical examination by a New York State Employee Health Service physician before she could return to work.

20. On or about February 24, 1988, petitioner was examined by Dr. Jaymala Ambewadikar, an Associate Physician with

the Employee Health Service of the New York State Department of Social Services.

21. In a letter dated March 18, 1988, a copy of which is annexed hereto as Exhibit "C", Dr. Ambewadikar notified the D.S.S. that petitioner's "symptomology" precluded her "from returning to work and performing full unrestricted duties of her title in a safe and sustained manner."

22. The aforesaid March 18, 1988 findings by Dr. Ambewadikar were arbitrary and capricious and lacked any rational basis.

23. Petitioner told Dr. Ambewadikar during her February 24, 1988 medical examination that she was symptom-free and ready to go back to work. Petitioner repeatedly advised respondents that she

disputed and wished to contest Dr. Ambewadikar's findings.

24. In a letter dated April 28, 1988, a copy of which is annexed hereto as Exhibit "D", the D.S.S. advised petitioner that she had been terminated effective April 27, 1988 pursuant to Civil Service Law §73, based upon the findings contained in Dr. Ambewadikar's March 18, 1988 letter.

25. At no time on or before April 27, 1988 did respondents grant petitioner a hearing on the issue of petitioner's fitness to return to work.

26. Prior to April 27, 1988, respondent Geri Martin told petitioner on several occasions that she was not entitled to a hearing.

27. The termination of petitioner from her position with the D.S.S. by respondents without granting her a hearing was arbitrary, capricious and unlawful.

28. On and before April 27, 1988, petitioner had a property interest in her position, of which she could not be deprived without a hearing.

29. To date, respondents have failed to restore petitioner to her position with the D.S.S.

30. On or about August 19, 1988, petitioner commenced an Article 78 proceeding in the Supreme Court, New York County, entitled *Hurwitz v. Perales, et al.*, Index No. 17881/88, to contest, *inter alia*, her termination from the D.S.S. On or about June 16, 1989, petitioner served

and filed an amended petition in that proceeding. A copy of the amended petition, verified June 15, 1989, is annexed hereto as Exhibit "E".

31. Petitioner submitted an affidavit dated June 15, 1989 and a reply affidavit dated October 25, 1989. Copies of these affidavits are annexed hereto as Exhibits "F" and "G" respectively.

32. The respondents in the aforesaid Article 78 proceeding filed an answer to the petition, verified August 29, 1989. A copy of this answer is annexed hereto as Exhibit "H". The respondents also submitted affidavits by Richard Burlew and Geri Martin in opposition to the petition. Copies of the Burlew and Martin affidavits are annexed hereto as Exhibits "I" and "J" respectively.

33. In a decision and judgment dated February 16, 1990 and entered February 23, 1990, a copy of which is annexed hereto as Exhibit "K," Justice Miller of the Supreme Court, New York County, held in *Hurwitz v. Perales*, Index No. 17881/88, that the termination of petitioner from her position without granting her a hearing was arbitrary, capricious and unlawful. Justice Miller granted the petition to the extent of remanding the proceedings to the D.S.S. for a hearing regarding petitioner's alleged disability.

34. In a motion dated March 14, 1990, petitioner sought to reargue Justice Miller's February 23, 1990 decision and judgment to the extent that it failed to address petitioner's right to reinstatement, back-pay, attorneys' fees

and damages. A copy of the papers filed in support of this motion to reargue are annexed hereto as Exhibit "L". Respondents' counsel submitted an affidavit in opposition to petitioner's motion for reargument. A copy of the opposing affidavit is annexed hereto as Exhibit "M".

35. In an order dated July 9, 1990 and entered July 10, 1990, Justice Miller denied petitioner's motion for reargument. A copy of this order is annexed hereto as Exhibit "N".

36. In or about March 1990, respondents served petitioner and her attorneys with a Notice of Hearing dated March 16, 1990. A copy of this Notice of Hearing is annexed hereto as Exhibit "O".

37. The aforesaid March 16, 1990 Notice of Hearing did not comply with the February 1990 judgment of the Supreme Court, New York County, in *Hurwitz v. Perales*, Index No. 17891/88, in that:

a) the Notice did not provide for a hearing to determine whether petitioner was presently disabled;

b) the Notice provided only for a hearing to determine whether petitioner had been "continuously absent from and unable to perform the duties of [her] position... during the period February 11, 1987 through February 24, 1988".

38. On May 9 and 10, 1990, a hearing allegedly pursuant to Civil Service Law §73 was held before D. Steve Rahmas of the D.S.S. Petitioner was represented by

counsel at the hearing. The D.S.S. was represented by Assistant Counsel Chase Pugliese.

39. At the May 9 and May 10, 1990 hearing (the "hearing"), the D.S.S. presented no evidence concerning petitioner's condition later than June 1988.

40. At the hearing, the D.S.S. presented no expert medical testimony concerning petitioner's condition or alleged disability for any time prior to March 10, 1988. The D.S.S. did not seek to qualify Dr. Ambewadikar as an expert witness.

41. On or about July 30, 1990, Mr. Rahmas submitted his "Report of Hearing and Recommendation" to the D.S.S.

A copy of this Report is annexed hereto as Exhibit "P".

42. In a "Final Determination and Order" dated August 3, 1990, a copy of which is annexed hereto as Exhibit "Q", respondents adopted the recommendation of Mr. Rahmas and "determined" that:

> "1. The applicable period to be considered for the disability in this matter is the period from February 11, 1987 to February 24, 1988.
>
> 2. The EHS examination conducted on February 24, 1988 was properly conducted and properly resulted in the conclusion expressed in a letter of March 18, 1988, which stated that the medical condition of

Nadine Hurwitz `precludes her from returning to work and performing full unrestricted duties of her title in a safe and sustained manner.'

3. In accordance with the first sentence of Section 73 of the Civil Service Law, Nadine Hurwitz is an employee who `has been continuously absent from and unable to perform the duties of his [sic] position for one year or more by reason of a disability.'

4. In accordance with the second sentence of Section 73 of the Civil Service Law, Nadine Hurwitz `may, within one year after the termination of such disability, make application to the civil service

department...for a medical examination to be conducted by a medical officer selected for that purpose by such department.' As stated in the third and remaining sentences of Section 73, `If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field in his former department or agency.'

5. For purposes of the second sentence of Section 73 of the Civil

> Service Law the period of `one year after the termination of such disability' must have been stayed during the pendency of this hearing and determination herein, and this period should not be considered to have expired until one year after the respondent Nadine Hurwitz has received notice of this determination."

On the basis of the aforesaid, the August 3, 1990 "Final Determination and Order", the D.S.S. concluded as follows:

> "ORDERED, that the Department shall continue to consider as terminated the employment of Nadine Hurwitz from her position as Principal Social Services Management Specialist, Grade 27."

43. The August 3, 1990 "Final Determination and Order" by the D.S.S. was arbitrary, capricious and unlawful in that:

a) the D.S.S. ignored the February 1990 judgment of the Supreme Court, New York County, in *Hurwitz v. Perales*, Index No. 17881/88, and failed to determine if petitioner was presently disabled;

b) the D.S.S. further ignored the aforesaid February 1990 judgment in restricting its decision to the petitioner's condition between February 11, 1987 and February 24, 1988;

c) the D.S.S. found that petitioner was "absent" from February 11, 1987 through February 24, 1988 despite

uncontradicted evidence that petitioner had asked to return to work by February 3, 1988 and had been barred from returning to work by respondents;

d) the D.S.S. found that petitioner was unable to perform the duties of her position from February 11, 1987 through February 24, 1988 although the only expert medical testimony provided at the hearing stated that petitioner was fit to return to work as of January 1988;

e) the D.S.S. sustained the April 27, 1988 termination of petitioner despite the holding in *Hurwitz v. Perales*, Index No. 17881/88, that such termination was unlawful;

f) the D.S.S. sustained findings by Dr. Ambewadikar which were irrational and improper;

g) upon information and belief, the D.S.S. relied upon the July 30, 1990 report of Mr. Rahmas which misstated and mischaracterized the evidence of the hearing, and which relied upon opinions expressed at the hearing by Dr. Ambewadikar who was never qualified as an expert witness;

h) the "Final Determination and Order" was otherwise arbitrary, capricious, unlawful and improper and ignored the proof offered at the hearing.

44. Petitioner has been employed by the New York City Department of Transportation ("DOT") since February

1989. Her duties and hours with the D.S.S. were no more onerous, stressful or physically demanding than are her present duties with the DOT.

45. Petitioner remains ready, willing and able to return to her position with the D.S.S.

46. The August 3, 1990 "Final Determination and Order" by the D.S.S. is final, and petitioner has no administrative remedies available.

47. To date respondents have failed to restore petitioner to her position.

48. Except as described herein, there has been no prior application for the relief requested herein.

AS AND FOR A FIRST CAUSE OF ACTION

49. Petitioner realleges and reasserts each and every allegation contained in paragraph "1" through "48" as if fully set forth herein.

50. The actions of respondents in denying petitioner a hearing on the issue of whether she is presently disabled and instead conducting a hearing covering only the period February 11, 1987 through February 24, 1988 violated the judgment of the Supreme Court, New York County, in *Hurwitz v. Perales*, Index No. 17881/88; violated petitioner's right to Due Process pursuant to the United States and New York State Constitutions and 42 U.S.C. §1983 and other provisions of law; and was otherwise arbitrary, capricious and unlawful.

AS AND FOR A SECOND CAUSE OF ACTION

51. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "48" as if fully set forth herein.

52. The action of respondents in terminating petitioner's employment in April 1988 without a hearing and in reaffirming the termination in the August 3, 1990 "Final Determination and Order" without granting petitioner a proper hearing violated petitioner's right to Due Process under the United States and New York State Constitutions and violated 42 U.S.C. §1983.

AS AND FOR A THIRD CAUSE OF ACTION

53. Petitioner realleges and reasserts each and every allegation contained in

paragraphs "1" through "48" as if fully set forth herein.

54. Petitioner was not "absent" from work on or after January 7, 1988, when she indicated she wanted to return to work.

55. Petitioner was therefore not "continuously absent" for a period of more than one year.

56. The termination of petitioner's employment with the D.S.S. therefore violated Civil Service Law §73.

AS AND FOR A FOURTH CAUSE OF ACTION

57. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "48" and "54" through "56" as if fully set forth herein.

58. The August 3, 1990 determination by respondents that petitioner was "continuously absent" from her position for a period of one year or more was not supported by substantial evidence and was arbitrary, capricious and unlawful.

AS AND FOR A FIFTH CAUSE OF ACTION

59. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "48" as if fully set forth herein.

60. The August 3, 1990 determination by respondents that petitioner was unable to perform the duties of her position with the D.S.S. after January 7, 1988 was not supported by substantial evidence and was arbitrary, capricious and unlawful.

AS AND FOR A SIXTH CAUSE OF ACTION

61. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "48" as if fully set forth herein.

62. The hearing conducted by respondents on May 9 and 10, 1990 was fundamentally unfair and violated petitioner's Due Process rights under the United States and New York State Constitutions and 42 U.S.C. §1983 in that:

a) Dr. Ambewadikar, whom the D.S.S. called as a fact witness but declined to qualify as an expert witness, was allowed to express medical opinion concerning the petitioner;

b) the Hearing Officer, Mr. D. Steve Rahmas, is the supervisor of the

counsel who appeared for the D.S.S. at the hearing. Mr. Rahmas was asked to disqualify himself but refused to do so.

c) the D.S.S. refused to supply petitioner with a copy of the transcript until after the final determination was rendered;

d) Mr. Rahmas refused petitioner's request to make his report available to petitioner until after the final determination was rendered;

e) counsel for the D.S.S. was permitted to ask leading and otherwise improper questions.

AS AND FOR A SEVENTH CAUSE OF ACTION

63. Petitioner realleges and reasserts each and every allegation contained in

paragraphs "1" through "48" as if fully set forth herein.

64. The August 3, 1990 "Final Determination and Order" was otherwise arbitrary, capricious, unreasonable and unlawful, in violation of the judgment in *Hurwitz v. Perales*, Index No. 17881/88, Supreme Court, County of New York, and in violation of 42 U.S.C. §1983.

AS AND FOR AN EIGHTH CAUSE OF ACTION

65. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "49" as if fully set forth herein.

66. The failure and refusal of respondents to allow petitioner to return to work violates petitioner's rights pursuant to the Due Process Clauses of the

United States and New York State Constitutions, 42 U.S.C. §1983, Civil Service Law §73, and other provisions of federal, state and local laws, rules and regulations.

AS AND FOR A NINTH CAUSE OF ACTION

67. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "49" as if fully set forth herein.

68. Petitioner is not, and was not commencing January 7, 1988, disabled from performing her job duties.

69. Respondents terminated petitioner's employment because they considered petitioner to be disabled from performing the duties of her job.

70. The action of respondents in terminating petitioner's employment based upon respondents' erroneous determination that petitioner was disabled, constituted unlawful discrimination in violation of Executive Law §296(a)(1).

AS AND FOR A TENTH CAUSE OF ACTION

71. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "49" and in paragraphs "68" through "69" as if fully set forth herein.

72. The action of respondents in terminating petitioner's employment because respondents considered petitioner to be disabled violated the Due Process and Equal Protection Clauses of the United States and New York State Constitutions, 42 U.S.C. §1983, and other provisions of

federal, state and local laws, rules and regulations.

AS AND FOR AN ELEVENTH CAUSE OF ACTION

73. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "49" and in paragraphs "68" through "69" as if fully set forth herein.

74. To the extent that respondents terminated petitioner's employment based upon her alleged disability, respondents have engaged in unlawful discrimination based on disability as defined in Executive Law §292(21), in violation of Executive Law §296(1)(a).

AS AND FOR A TWELFTH CAUSE OF ACTION

75. Petitioner realleges and reasserts each and every allegation contained in

paragraphs "1" through "49" and in paragraphs "68" through "69" as if fully set forth herein.

76. To the extent that respondents terminated petitioner's employment based upon her alleged disability, respondents have violated the Due Process and Equal Protection Clauses of the United States and New York State Constitutions, 42 U.S.C. §1983, and other provisions of federal, state and local laws, rules and regulations.

AS AND FOR A THIRTEENTH CAUSE OF ACTION

77. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "49" as if fully set forth herein.

78. Petitioner has sustained severe emotional distress and anguish as a result of respondents' unlawful actions.

79. Petitioner is entitled to an award of compensatory damages pursuant to 42 U.S.C. §1983, and a trial to determine the damages to which she is entitled should be directed.

AS AND FOR A FOURTEENTH CAUSE OF ACTION

80. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "49" as if fully set forth herein.

81. Petitioner in this proceeding, in *Hurwitz v. Perales*, Index No. 17881/88, and at the May 9 and 10, 1990 D.S.S. hearings has been required to retain counsel to protect her rights secured by 42 U.S.C. §1983.

82. Petitioner is therefore entitled to an award of reasonable attorneys' fees and disbursements pursuant to 42 U.S.C. §1988.

AS AND FOR A FIFTEENTH CAUSE OF ACTION

83. Petitioner realleges and reasserts each and every allegation contained in paragraphs "1" through "49" as if fully set forth herein.

84. The actions of respondents complained of herein were otherwise arbitrary, capricious, unreasonable and unlawful.

WHEREFORE, petitioner respectfully prays for a judgment pursuant to Article 78 CPLR, 42 U.S.C. §1983, and other applicable provisions of law:

a) reviewing the actions of respondents complained of herein;

b) adjudging and declaring that the actions of respondents in terminating petitioner's employment as a Principal

Management Specialist with the New York State Department of Social Services were arbitrary, capricious, unreasonable and unlawful;

c) vacating and annulling the aforesaid actions of respondent;

d) adjudging and declaring that the hearing conducted by the D.S.S. and the August 3, 1990 "Final Determination and Order" were arbitrary, capricious and unlawful;

e) directing and ordering respondents to reinstate petitioner to the position of Principal Management Specialist with the New York State Department of Social Services with full back pay, and the privileges and benefits attendant to that position, retroactive to

the date of termination, or, in the alternative, directing a trial of the factual issues raised herein;

f) directing that a trial be held to determine the compensatory damages to which petitioner is entitled pursuant to 42 U.S.C. #1983 [sic] and other applicable provisions of law;

g) ordering respondents to pay to petitioner reasonable attorneys' fees pursuant to 42 U.S.C. §1988; and

h) ordering such other and further relief as to the Court seems just and proper.

Petitioner respectfully requests an order transferring this proceeding to the

Appellate Division, First Department, pursuant to CPLR §7804(g).

Dated: New York, NY

October 16, 1990

GORDON, GORDON & TEPPER, P.C.
Attorneys for Petitioner
3 Park Avenue - 28th Floor
New York, New York 10016
(212) 725-3700

V E R I F I C A T I O N

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

NADINE HURWITZ, being duly sworn, deposes and says:

I am the petitioner in the within action; I have read the foregoing Petition and know the contents thereof; and the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

/s/ Nadine Hurwitz

Sworn to before me this
16th day of October 1990

_____
Notary Public

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter of

a Hearing for

NADINE HURWITZ

Concerning Separation

for Ordinary Disability

under Section 73 of the

Civil Service Law

REPORT OF
HEARING and
RECOMMENDATIONS

Upon hearing the above matter on May 10 and 11, 1990, a transcript of said Hearing having been prepared to forward with this Report, together with an Appendix containing a copy of the Exhibits accepted as evidence at such hearing, and upon reading a post-hearing submission dated June 8, 1990, prepared by the Attorney for

Nadine Hurwitz and a response thereto dated June 20, 1990, prepared by Department Attorney Chase Pugliese, the following report, record of such hearing and recommendations are referred for review and decision:

FACTS

Respondent Nadine Hurwitz is a person who performed the duties of a Principal Social Services Management Specialist, Grade 27, in the Metropolitan Regional Office of the Department Office of Audit and Quality Control. [Hearing Transcript Record [R.], page(s) [p(p)] 49 &517.] After having had mononucleosis in August and September of 1986 [R. p 520] and thereafter suffering several vertigo attacks [R. pp 521-524], respondent did not return to work after February 10, 1987

[R. pp 53 & 517]. By letter dated December 10, 1987 [R. p 72, State Exhibit 17], respondent was informed that failure to provide medical documentation confirming her ability to return to work and perform the duties of her position by February 10, 1988 would result in her immediate termination under Civil Service Law Section 73. A subsequent examination by the Department of Civil Service Employee Health Service [EHS] on February 24, 1988, resulted in a medical evaluation that respondent's medical condition was such that it precluded her from returning to work and performing full unrestricted duties of her title in a safe and sustained manner [R. p 78, State Exhibit 20].

As the result of a judicial proceeding pursuant to Article 78 of the CPLR instituted by respondent against the Department (*Hurwitz v. Perales*, NY Sup. Ct., New York Cty, Index No. 17881/88), Justice Edith Miller issued an Order and Decision dated February 16, 1990, requiring that the proceedings be "remanded to the respondent agency for a hearing regarding petitioner's alleged disability." (Decision of Hon. Edith Miller dated February 16, 1990, p 5.] Relying upon *In the Matter of Economico v. Village of Pelham*, 50 NY2d 120, 128, 428 NY Supp2d 213, 217, Justice Miller opined that Nadine Hurwitz "was entitled to a hearing wherein she would be able to present medical documentation in her favor to indicate that she was indeed able to perform all the duties required by her

civil service position." [Decision of Miller, *id.*] By Notice of Hearing dated March 16, 1990 [R. p 47, State Exhibit 1], a hearing under section 73 of the Civil Service Law was scheduled for April 11, 1990, but the hearing was adjourned on consent to May 9, 1990.

SUMMARY OF HEARING

Non-Testimonial Considerations

Procedure

Because no procedure for hearings involving Civil Service Law Section 73 is described or prescribed by law, regulations or custom, it was determined that the procedures described in Civil Service Law Section 75 were most nearly analogous and that the format of those hearings would be followed.

[R. pp 169-174, 435-44 & 513.] Civil Service Law Section 75 provides for a hearing that is heard before a representative of the Commissioner with a report being made to the Commissioner. [R. p 169.] After a decision is made by the Commissioner or his designee, the transcript, report and recommendations, as well as the decision and any other related documents, will be available to all parties. [R. pp 171 & 444.]

Transcript

The parties were informed that the transcript would not be provided to any parties until after a decision was rendered by the Commissioner or his designee, but that a copy of the transcript could be obtained at any party's own expense from the Hearing

Reporter at any time. [R. pp 172-174, 443-444 & 513-514.] In a post-hearing submission dated June 8, 1990, appended to this Report, the attorney for Nadine Hurwitz objected to being "deprived of a transcript" prior to the preparation of his submission and prior to the preparation of the Report; however, the parties were clearly informed that they could obtain a transcript from the reporter at their own expense at any time. [R. p 514.]

Recusing Hearing Officer

During the hearing, at the request of Kenneth Gordon, the attorney for Nadine Hurwitz, it was put on the record that Steve Rahmas, the person designated to hear this hearing and report and recommend to the Commissioner, was the deputy

director of the Division of Legal Affairs Bureau of Administration, Operations and Systems Law and that Chase Pugliese, the attorney for the Department at this hearing, was a member of that same bureau. [R. pp 168-169.] Subsequently, Attorney Gordon made an application that the Hearing Officer recuse himself because he was from the same office as the Department attorney for the case [R. pp 256-257] and by a post-hearing submission dated June 8, 1990, he continued his objection "on the grounds of your close working relationship with Mr. Pugliese, the Department's Attorney." It was determined that the person hearing this matter was designated by the Commissioner of the New York State Department of Social Service and did not have the authority to recuse himself. [R. p 257.]

Post-Hearing Written Submissions

It was determined that the parties would be permitted to make post-hearing written submissions after the conclusion of the hearing and testimony. [R. pp 514-516.] Since there was no prescribed time period for such submissions, it was suggested that thirty days would be an appropriate time period for any memorandum or other documents to be submitted and June 11 was agreed upon as an appropriate date before which submissions should be made. [R. p 515.] It was intended that counsel exchange any communications if a submission would be made. [R. p 516.] It was not intended that either party be permitted to raise new matter or issues without the opportunity for the other party to respond. Kenneth Gordon, the attorney for

Nadine Hurwitz, sent a post-hearing submission dated June 8, 1990, received June 11, 1990, describing, among other things, for the first time, a newly decided unreported judicial decision [*Prue v. Hunt*, App. Div., 4th Dept., May 11, 1990]. Department Attorney Chase Pugliese responded to this portion of the post-hearing submission with a submission dated June 20, 1990. By letter dated June 29, 1990, Attorney Gordon stated his "understanding that reply submissions would not be permitted," and further stated that "[i]n the event Mr. Pugliese's letter is considered, I would ask that this letter also be considered." All recited post-hearing submissions have been considered in the preparation of this report.

One Year Disability Time Period

According to the Notice of Hearing, the period of disability that is to be considered is "the period February 11, 1987 through February 24, 1988." [Exhibit 1, R. p 47.] Respondent argues that "[t]he issue is whether she has been disabled for the last year" [R. p 7] and her attorney states in his submission of June 8, 1990, that "the relevant period is May 1989 through May 1990." Arguments regarding this issue were extensively raised at the start of the hearing [R. pp 2-21], respondent arguing that Justice Miller had ordered that the current disability of Nadine Hurwitz be considered [R. p 11]. It was determined that the hearing would consider "whether or not there was an appropriate termination, or attempted termination

under 73, as recited in the first sentence of Civil Service Law 73, at the time the attempted termination was made," but that "[i]f there is some evidence, or proof to show, to support a different theory, for the sake of economy,...the proof [would be allowed] to be submitted so that if there is some other determination at a later time, that there need not be an additional hearing." [R. p 16.] At the conclusion of the State's case by Mr. Pugliese, respondent's attorney, Mr. Gordon, moved to dismiss the State's case [R. p 435] on the basis that no evidence had been presented as to the disability period of one year prior to the hearing, but decision on the motion was necessarily reserved [R. p 441], as the ultimate decision would have to be made by the Commissioner or his designee. [R.

pp 435-444.] In his submission of June 8, 1990, Attorney Gordon again raises the same argument.

Testimony

Because of the need to accommodate the schedules of several medical doctors, the sequence of testimony is disjointed and does not follow a logical sequence. The summaries set forth below are presented in the order that should have been followed.

Stipulations [R. pp 42-81; State Exhibits 1-20]

It was stipulated and agreed that as of January, 1987, Nadine Hurwitz was a Principal Management Specialist employed by the Department in its Offie [sic] of Audit and Quality Control [R. p 49] and that she had not returned to work since

February 10, 1987 [R. p 53]. By stipulation, various copies of documents [State Exhibits 1-20], consisting of notices, letters and medical reports were received in evidence on the understanding that they were being received "not necessarily for the truth of what is contained in the documents, but for the fact that they were submitted" [R. p 61].

State Witnesses

Geraldine C. Martin
[R. pp 81-104 & 175-219]

Geraldine C. Martin was the Associate Personnel Administrator responsible for personnel in the Department's Ofice [sic] of Audit and Quality Control in January, 1987. [R. p 82.] Her testimony stated that between January, 1987, and November, 1987, three different physicians had

reported that Ms. Hurwitz was disabled. [R. p 179.] After receiving a letter from Arnold Drapkin, M.D., dated November 19, 1987, stating that Ms. Hurwitz would be totally disabled for another six months [R. p 175; State Exhibit 11], she had a Notification of Termination Letter, dated December 10, 1987, State Exhibit 17, prepared to apprise Ms. Hurwitz of her her [sic] rights under the statutory language set forth in Section 73 of the Civil Service Law [R. pp 177-178].

The Department subsequently received a letter from Dr. Drapkin dated January 7, 1988, State Exhibit 12, stating that Ms. Hurwitz had completely recovered [R. p 181], but the letter, in the opinion of Ms. Martin, could be construed to place limitations on Ms. Hurwitz' ability to

return to her position with the Department [R. p 185]. Because the letter raised questions in Ms. Martin's mind, it was decided, after consultation with Ms. Martin's supervisor, to send Ms. Hurwitz to EHS for their evaluation of her ability to return to work. [R. p 190.] As a result of a letter dated February 4, 1988 [Exhibit 18], EHS scheduled a medical evaluation for Ms. Hurwitz. [R. p 192.] After receiving an interim report dated the date Ms. Hurwitz was examined on February 24, 1988 [R. p 196; Exhibit 19], Ms. Martin received the final report of EHS dated March 18, 1988, State Exhibit 20 [R. p 197], which stated, among other things, that "[t]he nature of [Ms. Hurwitz'] symptomatology is such that it precludes her from returning to work

and performing full unrestricted duties of her title in a safe and sustained manner [see State Exhibit 20]."

Seymour Feinstein [R. pp 219-252]

Seymour Feinstein was a Chief Social Services Management Specialist for the Metropolitan Regional Office [Jamaica, Queens, NYC] of the Department Office of Audit and Quality Control and was the Supervisor of Nadine Hurwitz. [R. p 22] He stated that in his opinion, if Ms. Hurwitz had returned to work half time in February, 1988, as stated in Dr. Drafkin's [sic] letter of January 7, 1988, State Exhibit 12, she would not have fully been able to perform the duties of her position [R. pp 223-226] because she was a supervisor and she would not be able to adequately supervise full-time

employees [R. p 227], nor would she be able to adequately perform other duties contained on her Individual Performance Program, Exhibit 2 [R. pp 227-230]. Mr. Feinstein also stated that he thought that any limitations on Ms. Hurwitz [sic] ability to travel would prevent her from fully performing the duties of her position. [R. pp 230-235.]

Dr. Jaymala Ambewadiker [sic] [R. pp 104-168 & 257-319]

Dr. Jaymala Ambewadikar is a physician employed by the New York State Employee Health Service [EHS], a division of the New York State Department of Civil Service, since 1981. [R. p 105.] The attorney for Nadine Hurwitz objected to Dr. Ambewadikar not being presented as an expert witness, but it was determined that

she did not need to be qualified as an expert witness because she was an actual witness testifying to her own knowledge as to the actual events and occurrences. [R. pp 108-112.] Dr. Ambewadikar stated that she had performed a medical examination of Nadine Hurwtiz for EHS on Februry 24, 1988 [R. p 113], and she concluded, as stated in her letter of March 18, 1988, State Exhibit 20, that Nadine Hurwitz could not return to work and perform full unrestricted duties of her title in a safe and sustained manner [R. pp 158-159].

The testimony of Dr. Ambewadikar contains an extensive, detailed description of the process by which Nadine Hurwitz was medically examined and by which Dr. Ambewadikar prepared her medical evaluation and conclusions on behalf of

EHS. [R. pp 112-168 & 257-272.] Without summarizing the specific medical testimony, the record shows that Dr. Ambewadikar examined the specifications for the Civil Service classification for Principal Social Services Management Specialist Grade 27 [R. p 160-163; Respondent Exhibit A] and properly arrived at her medical determination that the respondent was disabled and unable to fully perform the duties required for her position of employment [R. pp 185-159 [sic]; State Exhibit 20]. Respondent had an ample opportunity to cross-examine Dr. Ambewadikar [R. pp 272-306] and did not establish any impropriety in the manner in which the EHS examination was conducted, although respondent did not

concede or concur that the EHS was correct in its medical conclusion.

Dr. Charles B. Stacy [R. pp 374-434]

Dr. Charles B. Stacy is a neurologist who testified as an expert witness who had medically examined Nadine Hurwitz as a patient during the period from March 10, 1988 [R. pp 377 & 433] to June 22, 1988 [R. p 433]. Respondent's attorney objected to the testimony of Dr. Stacy being considered for the State if the relevant period was determined to exclude events after February 24, 1988 [R. p 387], while the Department attorney maintained that the respondent's medical condition immediately following the period ending February 24, 1988, was relevant to an evaluation of her condition during the prior period [R. pp 387-389]. Testimony

and evidence was received subject to further consideration of both positions. [R. p 389.]

Dr. Stacy first examined Nadine Hurwitz on March 10, 1988 [R. p 377], and prepared a medical report dated March 14, 1988 [R. p 386-389; State Exhibit 25], in which Dr. Stacy recorded that Nadine Hurwitz told him that she was still not back at work because of the symptoms [R. p 379]. Dr. Stacy subsequently examined Ms. Hurwitz on April 11, 1988 [R. p 409], and prepared a letter dated April 12, 1988 [R. p 410; Respondent Exhibit D] stating that she could have returned to work at that time [R. pp 411-413] and also prepared a report dated April 19, 1988 [R. p 410; Respondent Exhibit C] stating, "I see no reason why she cannot return to

work [R. p 412]." Dr. Stacy again examined Nadine Hurwitz on April 19, 1988 [R. pp 385 & 389], and prepared a report dated April 26, 1988 [R. pp 394-395; State Exhibit 26], in which it was stated that Nadine Hurwitz had intended to return to work, but prior to being able to return to work, she became sick again [R. pp 385 & 390]. Dr. Stacy examined Nadine Hurwitz for the final time on June 22, 1988 [R. pp 395 & 433], and prepared a report dated June 23, 1988, at the request of Ms. Hurwitz [R. pp 399-400; State Exhibit 28] that stated that she continued to suffer from vertigo and was unable to function well and also prepared a report dated June 27, 1988 [R. pp 397-398; State Exhibit 27], in which it is stated that "she is unable to work" [R. p 430].

Without summarizing the specific medical testimony, the record shows that Dr. Stacy's medical opinion was that Nadine Hurwitz "continues to suffer from distressing and disabling symptoms related to her diagnosis of positional vertigo and myofascial pain syndrome" [R. p 399; State Exhibit 28] and that she was not able to fully perform the duties of her job as a Principal Management Specialist [R. pp 400-409, 426 & 430-432] during the period of March 10, 1988, to June 22, 1988 [R. p 434]. Dr. Stacy found that there had been objective physical damage to the vestibular system [R. pp 384-385 & 392-393], which is the part of the brain connected to the inner ear which regulates motions with respect to gravity and angular acceleration [R. p 380], together with the subjective symptom of positional

vertigo [R. pp 392-394], which is a syndrome in which the rapid assumption of a particular posture of the head elicits an inner sense of spinning and dizziness [R. p 413]. Dr. Stacy's opinion as to whether a person is able to work with the symptoms described for Nadine Hurwitz depends upon the exact requirements of the job tasks described, as it was his opinion that a patient with such symptoms could work in an office environment [R. pp 416-419], but could not fully perform the duties of Principal Management Specialist [R. pp 400-403 & 426].

Respondent Witnesses

Nadine Hurwitz [R. pp 516-563]

Nadine Hurwitz, the respondent in this administrative proceeding, was a Principal Social Services Management Specialist who

was employed by the New York State Department of Social Services and whose last actual day of work was February 10, 1987. [R. pp 515-517.] She has been currently employed by the New York City Department of Transportation, Office of Para-Transit Operations, since February 27, 1989, and in that position is the principal liaison with the contractor who supplies transportation for the disabled in Manhattan. [R. pp 543-545.] In 1988 she did volunteer work for the Lenox Hill Hospital and for the Lighthouse for the Blind. [R. pp 542-544.]

In August and September of 1986 Ms. Hurwitz had mononucleosis and was out sick from work. [R. p 520.] After she went back to work in October she had the first vertigo attack she ever had and was

out from work for about two weeks in November. [R. pp 520-521.] On January 1, 1987, she had two vertigo attacks and had another attack on the 3rd. [R. p 23.] She did not return to work until February 5th and 6th, when she returned to work to clear up things in her office at the Office of Audit and Quality Control in Jamaica, Queens, before transferring to a new position with the Division of Adult Services in Manhattan effective February 9, 1987. [R. pp 525-526.] After working for two days, February 9th and 10th, in Adult Services, it became clear to her that she was just too sick to continue, left work and did not after February 10, 1987, return to work for the New York State Department of Social Services. [R. p 526.] Subsequently, at her own request, she was reassigned to her

old job in the Office of Audit and Quality Control. [R. pp 526-527.]

According to Ms. Hurwitz, from February 11, 1987, to the end of the year she had persistent wooziness, and unsteadiness, and nausea, but these symptoms very slowly resolved until the middle of December, 1987, when she started to experience more good days together. [R. pp 527-528.] Toward the end of December, 1987, she started to feel better and at the beginning of January, 1988, she felt well enough to go back to work. [R. pp 528-529.] She discussed her condition with Dr. Arnold Drapkin, who prepared a document State Exhibit 12 [dated January 7, 1988], that stated that Ms. Hurwitz had "completely recovered from her labrynthitis and should be able to

return to her usual job by 2/3/87," but requested that she be permitted to work half-time for at least two months and that she be permitted to work at a location with minimal travel. [R. pp 529-532.] Ms. Hurwitz was willing to work full-time if the Department declined to allow her to work half time. [R. p 531.]

After receiving a copy of the letter requesting an EHS examination, State Exhibit 18 [dated February 4, 1988], Ms. Hurwitz showed up for the examination by Dr. Ambewadikar on February 24, 1988. [R. pp 532-533.] She described her examination by Dr. Ambewadikar [R. pp 533-539] and particularly stated that she told Dr. Ambewadikar that she did not want to lie flat or bend over because she did not want to do anything that might

exacerbate her condition and cause symptoms. [R. pp 535-536.] When she received Dr. Ambewadikar's report, State Exhibit 20 [dated March 18, 1988], she stated, "I was beside myself, because I had just gotten over this terrible illness, and now they were throwing me out of my job." [R. p 539.] She also stated that during the period March, 1988, through June, 1988, "I had good days, and I had bad days; but I never had any period of time when I felt I couldn't work." [R. p 540.]

Ms. Hurwitz applied for a state disability pension and applied for Social Security disability benefits, but applications for both pensions were denied. [R. pp 541-542.] She then began to look for work in August or September of

1988, around the time when she got the denials. [R. p 543.] After she began working for the New York City Department of Transportation on February 27, 1989 [R. p 544], she has been absent from her new job an estimated two days a month because of wooziness or a virus [R. p 560]. She states that her wooziness and dizziness would not have precluded her from returning to work with the Department of Social Services and states that "it hasn't stopped me from working where I'm working now; it would not have stopped me from working there." [R. p 559.]

Dr. Arnold Drapkin [R. pp 444-513]

Dr. Arnold Drapkin is a specialist in internal medicine who testified as an expert witness who had medically examined Nadine Hurwitz as a patient during the

period from "early `87" [R. p 448] and "treated her condition since then" [R. p 448] to sometime "within the last few months" [R. p 469]. He did not bring any records with him to the hearing [R. p 468] and testified apparently from memory except when he was referred to an exhibit already in evidence. Dr. Drapkin said Ms. Hurwitz had symptoms of vertigo in 1987 and stated that he "thought that she had labyrinthitis." [R. p 448.]

Dr. Drapkin acknowledged his letter of November 19, 1987, State Exhibit 11, in which he stated that Ms. Hurwitz was totally disabled and will remain so for another six months. [R. pp 449-450.] He also acknowledged his letter of January 7, 1988, State Exhibit 12, in which he stated that Ms. Hurwitz had completely recovered

from her labyrinthitis and should be able to return to her usual job by February 3, 1987, a date which was a typographical error and should have been February 3, 1988. [R. pp 450-451.] When asked how he reconciled these two letters, he stated that this condition was one of "unpredictable duration" and that "[e]verytime you make a guess as to the duration, you can be wrong within a month, a week. So, the November, 1987 letter was a prediction, just an educated guess, based on the fact that she had not recovered rapidly during the course of the previous year." [R. p 451.] Dr. Drapkin also stated that Ms. Hurwitz was able to go back to work on a full-time basis in January, 1988 [R. p 453], but that he requested her to go back half-time with

minimal travel only to guarantee her having no relapse [R. pp 453-458].

Dr. Drapkin extensively testified that he believed that Ms. Hurwitz could have returned to work and that returning to work would have been beneficial for her. [R. pp 451-468.] However, he had no detailed knowledge of the duties of Ms. Hurwitz' position as a Principal Management Specialist [R. pp 482-483] and he acknowledged that he was not a neurologist [R. p 481]. His entire testimony appears to indicate that he believed that his role as a medical doctor was to support the needs of his patient and that he believed that it would be beneficial to his patient Ms. Hurwitz to support her attempt to return to work. [See R. pp 457-458.]

Dr. Gerald Klingon [R. pp 320-374]

Dr. Gerald Klingon is a neurologist who testified as an expert witness who had medically examined Nadine Hurwitz, who was referred to him by the New York State Employees Retirement System, on July 25, 1988 [R. p 323]. The purpose of the examination was to determine if claimant Nadine Hurwitz was permanently disabled and unable to perform all of the duties of the position of Management Specialist because of a claimed disability of "labryonthitis". [sic] [R. pp 325 & 356; State Exhibit 24.] After his examination Dr. Klingon prepared a report dated 25 July 1988, which stated, "I do not think Miss Hurwitz is disabled and in my opinion she is from a physical standpoint able to return to work immediately and I am not in agreement with the Employee Health Service

Physician who held that she was not employable." [R. pp 326-329; Respondent Exhibit B.] Dr. Klingon's testimony emphatically stated that Ms. Hurwitz had no permanent disability [R. pp 363-365 & 370], but he also stated that labyrinthitis could create a disability for some finite or specific period of time that might possibly be protracted and occurring during the course of a year [R. p 364].

RATIONALE

Civil Service Law Section 73

Section 73 of the Civil Service law, "Separation for ordinary disability; reinstatement," provides that "[w]hen an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of

a disability, other than a disability resulting from Occupational injury or disease as defined in the workmen's compensation law, his employment status may be terminated and his position may be filled by a permanent appointment." It also contains an entirely separate and distinct provision that "[s]uch employee may, within one year after the termination of such disability, make application to the civil service department...for a medical examination to be conducted by a medical officer selected for that purpose by such department. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a

position in a lower grade in the same occupational field in his former department or agency."

By its language, this section therefore establishes a bifurcated process whereby employment may be terminated if a disability is the reason for a continuous absence of one year or more, but full or limited reinstatement is subsequently required if the disability ends and the employee is found fit to perform the duties of a former or similar position after having requested an EHS examination within one year after the disability has ended. Thus there are two separate one year periods that are set forth in Section 73: (1) the one year period before which there can be no termination for disability and (2) the one year period

in which a request for an EHS examination must be made before reinstatement can be effected after a disability ends. Unless an employee has been terminated as a result of being disabled for one year as described in the former process, that employee cannot be reinstated pursuant to the second process. Once an employee has been terminated pursuant to the first process, the one year period in the second process does not begin to run until the disability ends; however, the end or "termination" of the disability, if it ever occurs, might not occur until after the passage of many years after termination of employment.

The respondent Nadine Hurwitz is contesting her termination of employment as described in the first process set

forth in the first sentence of Section 73 [see R. p 16]. From the testimony, evidence and argument received in this matter, it is evident that the one year period to be considered in this matter is a one year period when this employee "has been continuously absent from and unable to perform the duties of [her] position" beginning on or after February 11, 1987. Ms. Hurwitz has not been at work for the Department since February 10, 1987, and must be considered to be "continuously absent" for one year or more. Whether she was "unable to perform the duties of [her] position for one year or more by reason of a disability" depends upon how one construes the statutory meaning of "disability" and the interpretation of EHS as a division of the Department of Civil Service should be accorded the most weight

in any such determination. The only evidence challenging the disability of Ms. Hurwitz, Dr. Drapkin's letter dated January 7, 1988 [State Exhibit 12], was discounted by Dr. Ambewadikar [R. pp 258-260] when she was conducting her medical examination and evaluation for EHS. Furthermore, Ms. Hurwitz was determined to be disabled after her examination on February 24, 1988 [see State Exhibit 20] and at that time she had been continuously absent from work since February 11, 1987, more than one year earlier.

In his post-hearing submission dated June 8, 1990, respondent's attorney argues that a recent decision, dated May 11, 1990 [the day after the hearings herein were concluded], *Prue v. Hunt*, 157 AD2d 160 (4th Dept.), "would require the

respondents there to consider the petitioner's disability within one year of the time of the hearing. This is precisely the construed construction of Civil Service Law Section 73 which Ms. Hurwitz urged at the hearing." Upon reading the decision it is evident that the Court found "that it is sufficient to interpret the statute to include the requirements of pretermination notification and an opportunity to be heard," *Id.* at 165, 166, and required only that the involved employee "be allowed to be heard on all issues as if the one-year requirement contained in section 73 has not yet expired." *Id.* at 166. It did not construe the one-year period to relate to the hearing date and indeed it found that the employee "petitioner failed to submit adequate

medical certification that he was able to return to full duty and, consequently, respondent was justified under the facts of this case, as found by Supreme Court, in terminating petitioner under section 73 of the Civil Service Law. The difficulty arises not in the termination itself, but in the procedures followed by respondent." *Id.* at 163.

Hearing Required

The provisions of Section 73 of the Civil Service Law on their face do not require and seemingly do not even contemplate the possibility of a hearing relating to the implementation of those provisions. Nonetheless, the Order and Decision of Justice Miller dated February 16, 1990, required that the proceedings be "remanded to the respondent

agency for a hearing regarding petitioner's alleged disability." [Decision of Hon. Edith Miller dated February 16, 1990, p 5.] Relying upon *In the Matter of Economico v Village of Pelham*, 50 NY2d 120, 128, 428 NY Supp2d 213, 217, Justice Miller opined that Nadine Hurwitz "was entitled to a hearing wherein she would be able to present medical documentation in her favor to indicate that she was indeed able to perform all the duties required by her civil service position."

In accordance with Justice Miller's order and decision the hearing did permit Ms. Hurwitz to present medical documentation in her favor and did provide a forum in which she could challenge the findings of Dr. Ambewadikar and EHS. An

examination of the medical documentation in favor of Ms. Hurwitz, Dr. Drapkin's letter of January 7, 1988, State Exhibit 12, and a review of the cross examination of Dr. Ambewadikar [R. pp 272-306] reveal no reason why the original conclusion of EHS, Dr. Ambewadikar's letter of March 18, 1988, State Exhibit 20, should not be determined to be appropriate and valid. The evidence presented established that Dr. Ambewadikar carefully and professionally considered the medical condition of Ms. Hurwitz and compared her condition to the job requirements pursuant to the civil service Classification Standard, Respondent Exhibit A [R. p 267] and reasonably concluded with respect to Ms. Hurwitz that "[t]he nature of her symptomatology is such that it precludes her from returning

to work and performing full unrestricted duties of her title in a safe and sustained manner" [R. p 159; State Exhibit 20].

Disability

"Disability" is a word that can have a variety of meanings depending upon the context in which it is used. For purposes of social security benefits, the term "disability" [other than blindness] means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than 12 months." [42 USC 416(i)(1)(A); Social Security Act 216(i)(1)(A).] For purposes of the state retirement system a member of the system may be entitled to "ordinary

disability retirement" benefits "[i]f the comptroller determines that the member is physically or mentally incapacitated for the performance of duty and ought to be retired for ordinary disability." [NY Retirement and Social Security Law Section 62(aa).] Pursuant to Section 73 of the Civil Service Law, "separation for ordinary disability" can occur "[w]hen an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability."

Under the various criteria set forth above, a person such as Ms. Hurwitz may be unable to perform the duties of her position for purposes of Section 73 of the Civil Service Law, but still not be incapacitated for the performance of duty

pursuant to the State Retirement Law, nor have an inability to engage in any substantial gainful activity as set forth in the US Social Security Act. In other words, she might not be able to perform the duties of a Principal Social Services Management Specialist for more than a year, but still not be incapacitated for the performance of some kind of state duty and not unable to engage in any substantial gainful activity as required for the receipt of social security disability benefits. Each circumstance of apparent disability must be examined in the context of the reason for which it is being considered. Therefore, the testimony of Dr. Klingon must be considered with an awareness of the fact that his medical examination was conducted for the purpose of 'determining if

Ms. Hurwitz was "permanently disabled" and eligible for disability benefits from the state retirement system.

Disability evaluations must also be considered to determine if the objective is to permit benefits or is to exclude participation. It may be, as suggested by Dr. Drapkin [R. pp 457-458], beneficial to an individual's health to return to work, but it might also impose an unintended burden upon a public employer if that individual cannot fully perform the duties of her position. The objective of Section 73 of the Civil Service Law appears to be to assure that civil servants are able to perform the duties of their positions. Although an employee should not be terminated without regard to the individual's right to due process, an

employee should not be insulated from removal when her presence may a [sic] detriment to her employer.

In the context of this matter it appears that Nadine Hurwitz was unable to fully perform the duties of her position and was continuously absent for one year or more by reason of a disability. Having now had the opportunity for a hearing, she should be considered to be duly terminated from her position on the basis of an appropriately conducted EHS examination.

RECOMMENDATION

Upon considering the facts and argument presented in this matter as above described, it [sic] recommended that it be determined that:

1. The applicable period to be considered for the disability in this matter is the period from February 11, 1987 to February 24, 1988.

2. The EHS examination conducted on February 24, 1988, was properly conducted and properly resulted in the conclusion expressed in a letter of March 18, 1988, which stated that the medical condition of Nadine Hurwitz "precludes her from returning to work and performing full unrestricted duties of her title in a safe and sustained manner."

3. In accordance with the first sentence of Section 73 of the Civil Service Law, Nadine Hurwitz is an employee who "has been continuously absent from and unable to perform the duties of his

position for one year or more by reason by reason [sic] of a disability."

4. In accordance with the second sentence of Section 73 of the Civil Service Law, Nadine Hurwitz "may, within one year after the termination of such disability, make application to the civil service department...for a medical examination to be conducted by a medical officer selected for that purpose by such department." As stated in the third and remaining sentences of Section 73, "If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower

grade in the same occupational field in his former department or agency."

5. For purposes of the second sentence of Section 73 of the Civil Service Law the period of "one year after the termination of such disability" must have been stayed during the pendency of this hearing and determination herein, and this period should not be considered to have expired until one year after the respondent Nadine Hurwitz has received notice of this determination.

It is further recommended that it be ordered that the Department shall continue to consider as terminated the employment of Nadine Hurwitz from her position as

Principal Social Services Management Specialist, Grade 27.

Dated: July 30, 1990

Respectfully submitted

/s/ D. Steve Rahmas

D. Steve Rahmas
Assistant Counsel Designee
by Delegation of Authority
to conduct a Hearing
Pursuant to Section 73
of the Civil Service Law

SR:rz

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter of

a Hearing for

NADINE HURWITZ

Final
DETERMINATION
and ORDER

Concerning Separation

for Ordinary Disability

under Section 73 of the

Civil Service Law

A hearing in the above-captioned matter having been duly held on May 9 and 10, 1990, before D. Steve Rahmas, Assistant Counsel, designated to hold and preside over a hearing in the above-captioned matter, and Nadine Hurwitz, having appeared in person and by her attorney, Kenneth E. Gordon, and the New York State

Department of Social Services, having appeared by Chase Pugliese, Assistant Counsel, and the hearing having been duly recorded, and a Report and Recommendation having been issued dated July 30, 1990,

NOW, upon reviewing the transcript of hearing and the exhibits in evidence therein, the Order and Decision of New York State Supreme Court Justice Edith Miller dated February 16, 1990, post-hearing submissions, dated June 8, 1990, and June 29, 1990, from Kenneth E. Gordon, Attorney for Nadine Hurwitz and a post-hearing submission dated June 20, 1990, from Chase Pugliese, Attorney for the Department; upon reading the Report of Hearing and Recommendations; and after due deliberation, it is

DETERMINED, that:

1. The applicable period to be considered for the disability in this matter is the period from February 11, 1987 to February 24, 1988.

2. The EHS examination conducted on February 24, 1988, was properly conducted and properly resulted in the conclusion expressed in a letter of March 18, 1988, which stated that the medical condition of Nadine Hurwitz "precludes her from returning to work and performing full unrestricted duties of her title in a safe and sustained manner."

3. In accordance with the first sentence of Section 73 of the Civil Service Law, Nadine Hurwitz is an employee who "has been continuously absent from and

unable to perform the duties of his position for one year or more by reason by reason [sic] of a disability."

4. In accordance with the second sentence of Section 73 of the Civil Service Law, Nadine Hurwitz "may, within one year after the termination of such disability, make application to the civil service department...for a medical examination to be conducted by a medical officer selected for that purpose by such department." As stated in the third and remaining sentences of Section 73, "If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a

similar position or a position in a lower grade in the same occupational field in his former department or agency."

5. For purposes of the second sentence of Section 73 of the Civil Service Law the period of "one year after the termination of such disability" must have been stayed during the pendency of this hearing and determination herein, and this period should not be considered to have expired until one year after the respondent Nadine Hurwitz has received notice of this determination.

It is therefore

ORDERED, that the Department shall continue to consider as terminated the employment of Nadine Hurwitz from her

position as Principal Social Services Management Specialist, Grade 27.

Dated: August 3, 1990

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

Cesar A. Perales

Commissioner of

Social Services

BY: /s/ Nelson Weinstock

Nelson Weinstock

Deputy Commissioner

for Administration

SR:r

No. 93-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NADINE HURWITZ,

Petitioner,

—against—

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services; GERI MARTIN, as Associate Personnel Administrator of the New York State Department of Social Services; THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; and JAYMALA AMBEWADIKAR, as Associate Physician with the New York State Department of Civil Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1993

No. 93-522

NADINE HURWITZ,

Petitioner,

—against—

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services; GERI MARTIN, as Associate Personnel Administrator of the New York State Department of Social Services; THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; and JAYMALA AMBEWADIKAR, as Associate Physician with the New York State Department of Civil Service,

Respondents.

ON PETITION FROM A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because the New York Court of Appeals correctly applied the decisions of this Court, the petition does not present a conflict among the federal courts of appeals, and no important federal question is raised which should be settled by this Court.

Statement of the Case

A. Statement of Facts

As summarized in the decision of the New York State Court of Appeals under review (set out at pp. B-3–B-8 of Appendix B to the Petition ["Pet."]), petitioner Nadine Hurwitz was a tenured civil service employee at the respondent New York State Department of Social Services ("the State agency") when she went on voluntary disability leave on February 11, 1987, suffering from labyrinthitis. Under the first sentence of New York Civil Service Law ("CSL") § 73, the position of a person on voluntary disability leave may be held for her for up to a year. In December 1987, the State agency informed petitioner that she would be continued on sick leave until February 10, 1988, but would be terminated pursuant to CSL § 73 if she did not provide medical documentation of her fitness to work and actually return to work by then. In January 1988, petitioner submitted a letter from her physician which stated that petitioner was fit and "should" be able to return to work by February 3, but asked that she be allowed to return on a part-time basis with reduced responsibilities.

The State agency referred petitioner for a medical examination by the New York State Department of Civil Services' Employee Health Service. In that examination, the State doctor observed symptoms of active labyrinthitis. The doctor also reviewed medical reports from six other physicians submitted by petitioner. The doctor sent the State agency and petitioner her report of her findings and her conclusion that petitioner was not able to perform the duties of her position.[1]

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[1] Petitioner repeatedly argues that she had fully recovered and was physically fit to return when the State agency prevented her from returning based on the State physician's incorrect report that she was not fit. (Pet. 34 n. 2, 36-7, 42-3) The court below pointed out that the determination as to whether the State physician's report was correct is a matter for the posttermination hearing, not to be finally resolved at the pretermination stage. (Pet. B-11–B-12) That issue would therefore not be before this Court if review were granted. Respondents maintain, more-

Petitioner objected to the report and asked to appeal it. The State agency said there was no appeal process but that it would withhold further action in order to allow petitioner to present further evidence to and discuss the report with the State doctor. Petitioner and her treating physician discussed the report with the State doctor, who declined to reconsider her opinion or to reexamine petitioner.

Petitioner then discussed the report with the State doctor's superior, who said a second examination could be given if the State agency made a referral. Petitioner, however, had a severe recurrence of labyrinthitis symptoms and withdrew her challenge to the State doctor's report before being informed that the State agency was willing to refer her for a second examination. The State agency terminated her employment pursuant to CSL § 73 in April 1988.

Petitioner commenced a proceeding pursuant to New York Civil Practice Law and Rules Article 78 to review her termination. The trial court granted the petition, deeming that the failure to inform petitioner of her "right" to a second examination deprived her of a meaningful pretermination opportunity to be heard, and remanded the proceedings to the State agency.[2]

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over, that if the question were reached, they submitted abundant evidence below, based on the State physician's physical examination of petitioner and reports and testimony from petitioner's own physicians, that she was not medically fit to return to work when the State agency terminated her employment after more than one year's absence on disability leave. (*See* Record on Appeal, N.Y. Court of Appeals, Clerk of the Court, pp. 171, 174, 257-62, 300-1, 304, 306-7, 310-2, 319, 331-9, 349-50, 352, 375-6, 450-3, 464-5, 470-2, 476-8, 487-8, 499-502, 563-9, 570-1, 574-82, 584, 588-9, 594, 608-10, 755, 764, 765-7, 771, 772-86, 788, 793-8, 805)

[2] Petitioner's suggestion (Pet. 25-30) that the New York County Supreme Court's decision was upheld by the Appellate Division, First Department, is incorrect. As pointed out by the Court of Appeals herein, the lower court remanded for further proceedings before the State agency. (Pet. B-7) Petitioner's motion for reargument was denied by order entered July 10, 1990, and the Appellate Division, First Department, dismissed the appeal by order entered December 4, 1990. While that appeal

On remand, the State agency held a hearing and concluded that petitioner was not capable of performing her duties at the end of her year of excused disability leave. (Pet. G-3) It adhered to its decision to terminate her employment. (Pet. G-5–G-6)

Petitioner then commenced this second Article 78 proceeding. Because her papers challenged the substantiality of the evidence, it was transferred to the Appellate Division for review. That court remanded the proceeding for a second hearing pursuant to CSL § 73, this one to be directed to petitioner's *present* ability to perform her duties, not her fitness when terminated.

B. Decision of the New York Court of Appeals

The Court of Appeals reversed. After summarizing the facts, it reviewed its decisions and this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The court stated that under *Loudermill*, employees who are entitled to full posttermination evidentiary hearings need only be given, at the pretermination stage, an explanation of the grounds for the discharge and an opportunity to respond. (Pet. B-9, citing *Loudermill*, 470 U.S. at 546)

Applying those standards to the facts, the court found that petitioner received the required explanation of the reasons for her discharge, including a copy of the State doctor's report, and an opportunity to be heard.[3] The State agency not only dis-

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was pending, the administrative hearing on remand was concluded, and petitioner commenced this case under a separate index number, seeking review of the decision after hearing.

[3] The Court of Appeals thus held that the proper focus of pretermination review under the first sentence of CSL § 73 is the claimed basis of the discharge: that is, the employee's fitness at the end of the year of disability leave. (Pet. B-9–B-10) It rejected the Appellate Division's reading of the statute to allow consideration at that stage of the CSL § 73 process as to whether the employee had subsequently recovered. Consideration of present fitness is only allowed *after* an employee who has been terminated in accordance with the first sentence of CSL § 73 applies for reinstatement under the second sentence of that statute.

cussed the decision with petitioner on several occasions, it allowed her to submit her own medical evidence, to have her personal physician speak with the State doctor, and to discuss the underlying report herself with the State doctor and her superior, in an effort to persuade each that the report should be disregarded. The fact that petitioner was not informed before she withdrew her administrative appeal that yet additional opportunities to respond might be afforded her "does not diminish the adequacy of her opportunity to be heard for due process." (Pet. B-11) She was not entitled to a final resolution at the pretermination stage of the accuracy of the State doctor's report. As *Loudermill* had held, the pretermination procedure "need not definitively resolve the propriety of the termination" and is only to serve "as an initial check against mistaken decisions . . . ." (Pet. B-11–B-12, citing 470 U.S. at 545-6)

REASONS FOR DENYING THE WRIT

1. The Court Of Appeals' Decision Is Consistent With This Court's Decision In *Loudermill*

Petitioner asserts that the decision below is in conflict with this Court's *Loudermill* decision because, she alleges, she did not receive a "meaningful" opportunity to contest her dismissal. (Pet. 39). This claim, on its face, presents only a question of the extent to which the record supports the judgment below. Ordinarily, such an appeal does not present a question warranting this Court's review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In any event, the New York Court of Appeals' decision is consistent with the due process standards announced in *Loudermill*. Petitioner was terminated after receiving written notice of the basis on which that action might be taken and a preliminary opportunity to respond. She then received a medical examination and was sent a copy of the examination report, including the State doctor's medical findings and conclusion

that petitioner was not able to perform the duties of her position. Petitioner was told of her proposed termination in writing, with an explanation that the termination decision was based on the medical report's finding that she was not fit for duty.[4] Respondents reviewed petitioner's own medical evidence of fitness and listened to her objections to the State physician's report, and respondents even afforded petitioner an opportunity to attempt to convince the State physician to change the report. (Pet. B-10–B-11). The court below accordingly found on these facts that petitioner received the "notice and . . . opportunity to respond" that *Loudermill* requires. 470 U.S. at 545-6. No

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[4] Petitioner's claim that she was deprived of constitutionally sufficient notice that the State physician's report could lead to her termination (Pet. 36) is pled as a separate constitutional claim for the first time in this Court. Even if review of the claim were not barred by the failure to raise it below, *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970); Stern, Grossman & Shapiro, *Supreme Court Practice* at 364 (6th ed. 1986), it is factually meritless.

On December 10, 1987, respondents wrote to petitioner that "If you wish to return to work, you must provide medical documentation attesting to your ability to perform the duties of your position prior to your return. . . . A medical examination will be [then] conducted [by a State physician] and the employee must be certified as physically and mentally able to resume the full duties of his position. . . ." Quoting from the first sentence of Civil Service Law § 73 (set out at p. 8 n. 6 below), the letter warned that "[f]ailure to provide medical documentation . . . will result in your immediate termination under Section 73 . . . ." (Record on Appeal, N.Y. Court of Appeals, p. 132) After petitioner submitted documentation, respondents wrote to her that she was being referred for examination by a State physician "to determine your ability to perform the full duties of your position . . . . As has been previously indicated to you, you may not return to work until the results of your examination are received by us." (Record, p. 36)

She thus was told in writing in advance that she would be terminated unless she first provided her own documentation of medical fitness and then was certified as fit by the State physician. Those letters adequately informed her that the State physician's report could lead to her termination if she was not found medically fit.

substantial legal issue is presented on the record herein warranting this Court's review.[5]

Petitioner's claim that *Loudermill* was violated because she was not given some means of "contesting" the State physician's report is meritless. (Pet. 35-6) As noted, the record shows that petitioner was given three separate opportunities to contest that report: first when respondents accepted and reviewed petitioner's own medical evidence; second when they listened to her arguments against their reliance on the State physician's report; and third when they agreed to let petitioner speak with the State physician and present further evidence in an attempt to convince the doctor to change her report.

Furthermore, although *Loudermill* requires an opportunity to be heard, it does not suggest that the agency must provide an *pre*termination evidentiary hearing at which the accuracy of the facts, such as a doctor's report, can be "contested." Challenges to the accuracy of the facts are the subject of the *post*termination evidentiary hearing. (Pet. B-11–B-12, citing *Loudermill*, 470 U.S. at 545-6)

Because the petitioner had multiple opportunities to be heard—to present arguments for why the State physician's report should not be given weight, to submit her own medical evidence before and after the State doctor's examination, and to attempt to convince the State physician to change her report —, she was provided all the process due under *Loudermill*. The decision below thus properly stated the standards established by this Court in *Loudermill* and applied them correctly on this record. The petition, therefore, does not raise a substantial legal issue warranting this Court's review.

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[5] Although petitioner initially argues that *Loudermill* entitled her to a pre-termination hearing (Pet. 18), she later concedes that she was not entitled to a full evidentiary hearing (Pet. 20, 36), nor, indeed, to more than notice and an oppc-tunity to respond (Pet. 23, 37).

2. The Petition Does Not Warrant Review Inasmuch As It Seeks Review Of The Interpretation Of A State Statute By That State's Highest Court, Rendered In An Opinion That Offers An Adequate, Independent State Ground For Decision

Petitioner also argues that this Court should review whether the New York Court of Appeals properly interpreted the word "absent" in New York Civil Service Law ("CSL") § 73. (Pet. 47) Her argument is essentially based on the claim that the Court of Appeals' interpretation violated its own prior decisions concerning the statute. (Pet. 43-5). This Court defers to the high courts of the nation's states in interpreting their own states' statutes. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688-689 (1959). The proposed question therefore is not suitable for review.

Petitioner attempts to give her statutory interpretation question a constitutional veneer by alleging that the interpretation she says the statute was given, allowing the State agency to find her "absent" from work unless she passed a medical examination, violates due process. (Pet. 46). She argues that since the statute is intended to protect an employee's right to return to work after an extended voluntary absence due to disability, it violates procedural due process if the statute is used instead to furnish a procedure to render the employee eligible for termination. (Pet. 47)

The statute has, on its face, the purpose of defining when the State may terminate a tenured civil service employee absent on disability leave, as well as of protecting an absent disabled employee from premature termination.[6] Petitioner does not dis-

[6] The first sentence of CSL § 73 provides: "When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's [*sic*: workers'] compensation law, his employment status may be terminated and his position may be filled by a permanent appointment."

pute that respondents were entitled under CSL § 73 to require her to provide medical proof of her disability while she was absent due to a disability.[7] She cannot complain if the process which preserved her job during the period of disability, turned up medical evidence that she was still disabled and unfit to return after the period had expired.

The CSL § 73 process did not "create the basis for termination," as petitioner alleges. (Pet. 47) Rather, it revealed that the basis existed. Petitioner had notice of the purpose of the examination and its possible consequences. *See* p. 6 n.4 above. The fact that the examination could serve two purposes did not make it violative of procedural due process.

Independent of CSL § 73, petitioner was, in any event, subject to the general civil service requirement facing any employee who has been absent on sick leave, that of showing that she was medically fit to return to work without endangering her co-workers. 4 N.Y.C.R.R. § 21.3(e).[8] Petitioner has never challenged the constitutionality of that regulation or its application to her. There was thus an independent and adequate state ground for the decision below which precludes this Court's review.[9] *Florida v. Casal*, 462 U.S. 137 (1983); *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958).

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[7] Petitioner incorrectly alleges that CSL § 73 only allows a State agency to terminate an employee on a demonstration that the employee was continuously absent for over a year and was disabled "[t]hroughout that period of absence . . . ." (Pet. 42). In fact, the statute allows termination of a person, such as petitioner, who suffers from an episodic or intermittent disability, on a showing that the employee left due to disability and was absent for more than a year.

[8] The regulation provides: "The appointing authority may require an employee who has been absent because of personal illness, prior to and as a condition of his return to duty, to be examined, at the expense of the department or agency, by a physician designated by the appointing authority, to establish that he is not disabled from the performance of his normal duties and that his return to duty will not jeopardize the health of other employees."

[9] In the court below, respondents cited both CSL § 73 and 4 N.Y.C.R.R. § 21.3(e) as their bases for ordering the physical examination

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

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of petitioner that found her still disabled. The Court of Appeals approved of the referral without specifying if it was approving the referral under the statute, the regulation, or both. (Pet. B-4, B-10) Since petitioner did not challenge the regulation or its application, those issues were not briefed and cannot be reached here. *See* p. 6 n. 4 above, citing, *inter alia*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970). If the issues were reached, respondents assert that there is no substantive due process right to return to work for which one is not medically fit and that an employee absent on sick leave for a physical condition does not have a procedural due process right to a hearing before being required to present medical proof of fitness to return to work.